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IN THE

Supreme Court of the United States

October Term, 1964

No. 234

HAROLD ROTH, HERBERT S. STERNBERG and MILTON HOLT,

Petitioners.

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND APPENDIX

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and

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. .....

HAROLD ROTH, HERBERT S. STERNBERG and MILTON HOLT,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Harold Roth, Herbert S. Sternberg and Milton Holt, pray that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit, entered June 5, 1964.

Opinions Below

The opinion of the Court of Appeals insofar as petitioners Roth and Sternberg are concerned is printed in the appendix to this petition (R 1-9)* and the opinion of

* References to the appendix to this petition is preceded in the cases of petitioners, Roth and Sternberg by the letter "R" and to Holt by the letter "H". References to the Roth-Sternberg appendix in the Court of Appeals is preceded by the letters "RS-a" and to the Holt appendix in the Court of Appeals by the letters "H-a".

the Court of Appeals insofar as petitioner Holt is concerned is also printed in the appendix to this petition (H 1-7). There was no opinion in the District Court.

Jurisdiction

The judgment of the Court of Appeals as to all petitioners was entered on June 5, 1964. Copies thereof are appended to this petition (R 9, H 8).

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 (1).

Questions Presented

(As to All Petitioners)

1. Whether a loan of money made by an employer to a union representative representing the employees of such employer was proscribed by Section 29 U. S. C. A. 186 (a) (Employer) and Section 29 U. S. C. A. 186 (b) (Union Representative), as it existed before its amendment on September 14, 1959.

2. Did Section 29 U. S. C. A. 186 (a) and (b) give fair warning that a loan was made criminal, prior to its amendment on September 14, 1959.

(Additional Questions Presented by Petitioner Holt)

3. Does the defendant in a criminal case have a constitutional right to waive a jury trial?

4. Does the Federal Rule of Criminal Procedure 23(a)'s conditioning of defendant's waiver of jury trial upon consent of the Government and approval of the Court violate due process?

5. Was the petitioner, Holt, denied a fair trial when his motion to disqualify the Trial Judge was denied after the Trial Judge, *sua sponte*, had disqualified himself from trying the case without a jury?

6. Was the petitioner Holt, denied a fair trial in the denial of his motion (a) that the proof was insufficient for conviction (b) that the Trial Court refused to charge that knowledge by Holt was a necessary element for conviction and (c) that hearsay evidence was inadmissible.

Statutes Involved

The statutes involved in the indictment are 29 U. S. C. A. 186 (a) as to petitioners, Roth and Sternberg and 186 (b) as to petitioner, Holt. These statutes as they existed before their amendment on September 14, 1959, provided:

> "Sec. 186. Restrictions on payments to employee representatives; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds
>
> (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.
>
> (b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value."

On September 14, 1959, these Sections were amended to provide:

> "Sec. 186. Restrictions on payments and loans to employee representatives, labor organizations, officers and employees of labor organizations, and to employees or groups or committees of employees; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds
>
> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or
>
> (3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in section 301-327 of Title 49) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees."

The Indictment as It Relates to Petitioners Roth and Sternberg

The first count of the indictment charges that the petitioners other than Milton Holt, who were allegedly "employers of employees in an industry affecting com-

merce", did "on or about the 18th day of October, 1957" (quoting from Title 29, United States Code, Section 186(a)), "unlawfully, wilfully and knowingly pay and deliver and agreed to pay and deliver to one, Milton Holt, Secretary-Treasurer, Local Union 805, Confectionery and Tobacco Drivers and Warehousemen, International Brotherhood of Teamsters, a representative of the aforesaid employees, a thing of value, to wit, money in the amount of $30,000." (RS-a 5a).

The third and fifth counts of the indictment are similarly worded except for the time and the amount of money. The third count states the time as "on or about the 15th day of April, 1959" and the amount of money in the sum of $50,000. The fifth count states the time as "on or about the 1st day of May, 1959" and the amount of money in the sum of $12,000 (RS-a 6a-7a).

The indictment asserts that the said petitioners' acts were also in violation of Title 18, Section 2—which, in substance, renders one who aids, abets * * * or procures (the) commission of an offense against the United States * * * punishable as a principal (RS-a 6a-7a).

The acts alleged in the indictment are controlled by Section 186 before its amendment.

The Facts

(Insofar as They Relate to Petitioners Roth and Sternberg)

Petitioners Roth and Sternberg were tried in the United States District Court for the Southern District of New York under the counts of the indictment previously recited. The jury rendered a verdict of guilty as to both petitioners on these counts. Roth was sentenced to six

months' imprisonment on Counts One, Three and Five to run concurrently and fined $10,000.00. Execution of the prison sentence was suspended (RS-a 83a). Petitioner, Sternberg was sentenced to two months' imprisonment on Counts One, Three and Five to run concurrently and fined $4,000.00 Execution of the prison sentence was suspended (RS-a 85a).

The Court of Appeals affirmed these convictions by a divided court. The majority held that a loan was proscribed by Section 186 as it existed before its amendment and that such Section gave clear warning that a loan was within its proscription. The minority dissented on the ground that Section 186, as it previously read "• • • failed to prohibit loans with that clarity which is required of criminal statutes" (R 9, H 7).

It was stipulated by the petitioners, Roth and Sternberg and the government that certain rudimentary elements of the offenses charged did exist, to wit: (a) that at all relevant times mentioned in Counts One, Three and Five of the indictment, these petitioners were employers of employees who were employed in an industry affecting commerce; (b) that at all relevant times mentioned in the above counts, Milton Holt was Secretary-Treasurer, Local Union 805, Confectionery and Tobacco Drivers and Warehousemen, International Brotherhood of Teamsters, and as such was a representative of such employees, who were employed in an industry affecting commerce (RS-a 91a-93a).

Any references made to Valley Commercial Corporation as having loaned monies to Mr. Holt through Adams Associates, are to be considered, for the purposes of this petition, as having been made by any of the corporations named in the indictment.

It is conceded that at the times of the alleged offenses, October 18, 1957, April 15, 1959 and May 1, 1959, petitioners were officers of the corporations named in the indictment.

Mr. Abrams is a partner in Adams Associates, which is engaged in the business of making loans (RS-a 8a).

Petitioners, Roth and Sternberg had been friends with petitioner, Holt for many years (RS-a 9a, 15a, 16a).

Petitioner, Sternberg, on or about October 18, 1957, with petitioner Roth's approval, telephoned Mr. Abrams requesting that Adams Associates lend $30,000.00 to petitioner Holt without interest and collateral and to take petitioner Holt's note for that amount endorsed by petitioner Holt's wife (RS-a 9a, 10a, 16a). Mr. Abrams was also informed by petitioner, Sternberg, that Valley Commercial Corporation would send its check for that amount to Adams Associates, which it did on October 18, 1957 (RS-a 9a, 10a). Adams Associates thereupon loaned $30,000.00 to petitioner, Holt on October 18, 1957 and obtained petitioner Holt's note endorsed by petitioner Holt's wife for $30,000.00 (RS-a 11a, 16a).

On June 10, 1958, this loan was fully paid by petitioner, Holt and Adams Associates sent its check on that day for $30,000.00 to Valley Commercial Corporation (RS-a 11a).

On or about April 15, 1959, petitioner, Sternberg, with petitioner, Roth's approval, telephoned Mr. Abrams requesting that Adams Associates lend petitioner Holt $54,600.00 without interest or collateral for two days; receive petitioner Holt's exchange check payable two days later for that amount; and that Valley Commercial Corporation would send its covering check for $50,000.00 to Adams Associates (RS-a 12a). Valley Commercial

Corporation sent its check on that day for $50,000.00 to Adams Associates (RS-a 12a).

On April 15, 1959, petitioner Holt received a check from Adams Associates for $54,600.00 and gave Adams Associates an exchange check dated April 17, 1959, for that amount (RS-a 12a, 13a, 17a). On April 17, 1959, Adams deposited petitioner Holt's check, which cleared, and thereupon Adams Associates sent its check for $50,000.00 to Valley Commercial Corporation (RS-a 13a, 18a).

On May 1, 1959, petitioner, Sternberg, with petitioner Roth's approval, telephoned Mr. Abrams requesting that Adams Associates lend petitioner Holt $12,000.00, without interest or collateral for about two (2) weeks, and to accept in return petitioner Holt's post-dated check for that amount dated two weeks later (RS-a 13a, 14a).

On May 1, 1959, Adams Associates gave petitioner Holt its check for $12,000.00 and in return petitioner Holt gave Adams Associates his post-dated check dated May 9, 1959 for that amount (RS-a 14a, 18a). On May 19, 1959 this loan was repaid by the deposit of petitioner Holt's check in the Adams Associates' bank account and its clearance (RS-a 14a, 18a).

The reason for Adams Associates, being the ostensible lender, was to insure that petitioner Holt would promptly repay the loans, since, if petitioner Holt thought the loans came from a stranger, he would be under a greater obligation to repay promptly (RS-a 15a, 17a).

As stated above, all of the loans made by Adams Associates were fully repaid by petitioner, Holt (RS-a 16a) before the petitioners Roth and Sternberg testified before the McClellan Committee on July 1, 1959, and before the indictment was returned which was on December 26, 1961 (RS-a 1a).

The Indictment as It Relates to Petitioner, Holt

The second count of the indictment charges, in substance, that Milton Holt, a representative of employees in an industry affecting commerce, on or about October 18, 1957, "did receive and accept * * * from Harold Roth, Herbert S. Sternberg, National Vending Corporation and Continental Vending Machine Corporation, employers of the aforesaid employees, a thing of value, to wit, money in the amount of $30,000.00."

The Fourth and Sixth counts of the indictment are similarly worded except that the employers named are Harold Roth, Herbert S. Sternberg and Continental Industries, Inc. and the respective amounts and dates involved are $50,000.00 on April 15, 1959, and $12,000.00 on May 1, 1959.

The trial of Holt on counts Two, Four and Six was, on motion of Holt, severed from the trial of Roth and Sternberg on counts One, Three and Five of the indictment.

Facts Insofar as They Relate to Petitioner, Holt

Petitioner Holt stipulated with the Government to three elements of the offenses charged, to wit (1) that at all relevant times, Milton Holt was Secretary-Treasurer of Local 805 and as such was a representative of employees of defendant corporations, who were employed in an industry affecting commerce; (2) that defendant, Harold Roth, was President of defendant corporations and defendant, Herbert S. Sternberg, was an employee of defendant corporations; and (3) that there was an agreement between defendant corporations and Local 805 signed by Milton Holt on behalf of Local 805 and Herbert

S. Sternberg on behalf of the defendant corporations (H-a 98a-100a).

The principal government witness was Frank Abrams a Certified Public Accountant, a member of the accounting firm of Abrams, Meresman & Company who had a business known as Adams Associates engaged in investments, trading and occasional loans (H-a 39a).

Abrams has known Herbert S. Sternberg only since the commencement of Valley Commercial Corporation, by whom Sternberg was employed (H-a 42a). His firm did a yearly audit for Valley Commercial (H-a 40a-41a).

At no time during any of the transactions named in the indictment did Abrams know or refer to Mr. Sternberg in any other context than in relation to Valley Commercial Corporation (H-a 71a-72a, 75a). Nor could he refer to Mr. Sternberg as being associated with, or part of, any other company because he knew of none other (H-a 73a, 75a). Specifically, Abrams did not know that Herbert Sternberg had any position at all with National Vending or Continental Vending & Machine Corporation (H-a 71a).

Abrams did not meet Holt until October 18, 1957, approximately one or two days after a telephone conversation with Herbert Sternberg. He had no prior business dealings with Holt and did not know what business he was in (H-a 42a-43a). Holt was such a complete stranger to Abrams that Abrams did not know that Holt was a union official of Local 805 or that Local 805 had a labor agreement with Continental or National Vending (H-a 69a-70a).

Over objection by defense counsel (H-a 51a), Abrams testified to a telephone conversation with Sternberg a day or two prior to October 18, 1957, wherein Sternberg asked Abrams to arrange a loan to Holt, a very good

friend of his, as a favor to Valley Commercial. He said he was sending up "our check for $30,000.00" and wanted Abrams to deposit the check and make a loan of $30,000.00 to Holt. Sternberg asked Abrams not to charge any interest on it (H-a 52a-53a), and told Abrams that he wanted this loan (and in fact each of the other two loans) to come from a stranger, so that Holt would not know that it came from Valley Commercial (H-a 77a). Sternberg explained if it came from Valley Commercial Holt might request too many extensions which Valley might not be able to refuse, but if the money was borrowed from a strange company, Sternberg would be in a position to see to it that Holt repaid (H-a 75a-76a).

A day or two after the telephone conversation, Holt came to Abrams' office and stated that he was Mr. Holt "about whom Sternberg of Valley Commercial spoke", and "that he came up for a loan" (H-a 44a-45a). Abrams told Holt that he was making the loan at the request of, and as a favor to, one of his very good clients, Valley Commercial (H-a 93a-94a), in whom he had a great confidence and faith and who had also asked that no interest be charged on it (H-a 46a, 47a-48a). There was no discussion of collateral or guarantors (H-a 49a).

Over objection by defense counsel (H-a 54a) Abrams testified that Adams Associates received a $30,000.00 check from Valley Commercial signed by Harold Roth as president (H-a 53a-55a, G-1) but Abrams never told Holt that he had received this $30,000.00 from Valley Commercial (H-a 80a).

Abrams had a note prepared in his office which both Holt and his wife were to sign and return to Abrams (H-a 77a). When the fully signed note was returned a day later, Abrams gave Holt a check from Adams Associates in the amount of $30,000.00 (H-a 55a, G-2). Holt repaid the $30,000.00 loan by check on June 10, 1958, and

Adams Associates thereupon sent its check for $30,000.00 to Valley Commercial (H-a 55a-56a, G-3).

Over objection by defense counsel (H-a 57a) Abrams testified that several days before April 15, 1959 (H-a 83a-84a), Abrams or his associate (H-a 89a-90a) received a call from Sternberg, in which Sternberg asked him to arrange for a loan or an exchange for Holt in the sum of $54,600.00 for approximately two days. Sternberg stated that he was sending Valley Commercial's check for $50,000.00 to enable the exchange to be made (H-a 57a-58a, 89a). There was no discussion with Sternberg about any other terms such as interest, collateral, security or the like (H-a 58a). On the day of the loan Abrams was out of the office and Sternberg spoke to Abrams' associate to arrange the loan. The accommodation was made by his associate (H-a 82a-83a). Valley Commercial's check dated April 15, 1959 for $50,000.00 was received on about that date by Adams Associates (H-a 58a-59a, G-4).

Abrams did not see or speak to Holt in connection with the loan (H-a 84a) but Holt came to the office and received a $54,600.00 check (H-a 59a-61a, G-5). The $54,600.00 loan was repaid by Holt two days later on April 17, 1959 (H-a 63a) and Adams Associates then sent its check for $50,000.00 to Valley Commercial (H-a 67a-68a, G-12).

Over objection by defense counsel (H-a 62a) Abrams testified that on or about May 1, 1959, Sternberg called Abrams and requested as a favor, that Abrams lend Holt $12,000.00 for about two weeks as an exchange (H-a 62a-63a). Holt received a $12,000.00 check from Adams Associates on May 1, 1959 (H-a 63a-64a, G-6) and gave a post-dated check in exchange (H-a 95a). The debt was repaid on May 19, 1959. No interest was charged and no collateral was given by Holt (H-a 64a). In connection with this loan, Abrams had no phone conversation with

Holt and did not recall whether he saw Holt at the time (H-a 95a).

On April 10, 1959, Adams made a loan to Holt in the sum of $35,000.00. A note, signed by Holt was endorsed by Sternberg, personally, called for 6% interest, and was paid by Holt on July 29, 1959 with $635.83 interest (H-a 61a-62a). (This loan is not the subject of any charge in the indictment.)

At the close of the Government's case, petitioner Holt moved to strike the hearsay testimony and the supporting documentary proof and for dismissal of the indictment and a judgment of acquittal. Decision was reserved (H-a 100a-102a). At the close of the entire case, decision was reserved on petitioner Holt's motion for judgment of acquittal (H-a 115a, 116a, 117a).

After the jury's verdict, petitioner Holt moved to set aside the verdict, for judgment of acquittal and for a new trial. All of petitioner Holt's motions were denied.

Reasons for Granting the Writ

(Insofar as All Petitioners Are Concerned)

I

By holding that a loan was proscribed by Section 186, and that such proscription was set forth with that clarity required by a criminal statute, the decision by the Second Circuit is in conflict with the decision of the Sixth Circuit on the same matter.

The majority opinion of the Court of Appeals in this case proceeded on the ground that Section 186, before its amendment, proscribed a loan and with that degree of clarity required of a criminal statute (R 1-9, H 1-7).

The Sixth Circuit in the case of *United States* v. *Carter*, 311 F. 2d 934, held that a loan was not proscribed by Section 186 as it then existed, and, in addition, that it did not give fair warning that a loan was proscribed.

The Second Circuit attempted to distinguish its decision from that of the Sixth Circuit. The Court realized that it had failed to make a valid distinction since it stated that if there were no distinction between the cases then it would in any event hold a loan proscribed by the Section. The Second Circuit stated in this respect "If *Carter* holds that any loan is exempt from the penalties of the statute then disagreement is in order" (R 8, H 2).

In the case of *United States* v. *Freuhauf*, 365 U. S. 146, this Court refused to reach the question as to whether a loan was prohibited by the statute. The decision of this court was predicated purely on procedural grounds, namely, that the District Court's ruling that the government's memorandum constituted a judicial admission of an actual loan was inpermissible and constituted an insufficient basis of this Court's jurisdiction on direct appeal (365 U. S. 146, 158). Mr. Justice Stewart, in his dissenting opinion, stated in substance, insofar as here relevant, that whether a loan of money was within the proscription of the statute was properly before the Court and should be decided.

There is a basic conflict on questions, which this Court did not reach, and which should now move this Court to take jurisdiction.

II

Sections 186 (a) and (b) did not proscribe a loan by an employer to a labor representative prior to its amendment on September 14, 1959.

Where such a statute creating a new crime merely *malum prohibitum* "admits of a double meaning," "all reasonable doubts must operate in favor of the accused," who was "entitled to an unequivocal warning" of the acts made criminal.

A. The words "pay or deliver" do not fairly connote a loan.

The three counts against the petitioners are based upon Title 29 U. S. C. A., Section 186 (a), as it existed at the time of the acts charged in the indictment, to wit, "on or about the 18th day of October, 1957", "on or about the 15th day of April, 1959", and "on or about the 1st day of May, 1959".

The words "pay or deliver any money or other thing of value" do not reasonably include the making of a loan, and therefore do not apply to the instant case. Webster's New International Dictionary (in substantially the same language as Funk & Wagnall and all of the other dictionaries) defines "pay" as:

> "2. To satisfy (one) for service rendered, property delivered, etc.; to discharge one's obligation to; to make due return to; to compensate; remunerate; * * * 3. To give in return for services, purchases, etc.; in satisfaction of a promise, a moral debt, * * * or in retribution (that which is due) * * * 4. To make compensation or retaliation for * * * to make up for * * *; to recompense. 5. To give, offer or make, freely or as fitting * * *."

It defines "deliver" as (*inter alia*) "To give or transfer; to yield possession or control of; to part with; to make or hand over." The synonym given for "deliver" is "release," and none of the many synonyms given for "pay" in any dictionary includes "lend." The mere assertion that a loan of money can be a "thing of value" is irrelevant; the point is that the verbs "pay" and "deliver" do not include "lend".

It is universally recognized that "the word 'pay' indicates the discharge of an obligation rather than an investment of money". *Hopson* v. *The Aetna Axle & Spring Co.*, 50 Conn. 597, 601. A loan, like an investment, is "made," not "paid".

Nor would anyone ordinarily describe the making of a loan as a "delivery". See *Western Union* v. *Lenroot*, 323 U. S. 490, 505-6, where it was held that, even in a non-criminal statute, the construction of such common verbs must be limited to their ordinary, "marketplace" usage, even though they may also have a broader meaning.

Furthermore, the word "deliver" in Section 186 (a) is obviously intended to apply to chattels or articles other than money. It is clear from the form, as well as the sense, of the section that the verb "pay" has as its object "money", whereas "deliver" has as its object "any other thing of value". The indictment herein specifies that at the times specified the only thing that was turned over was "money in the amount of $30,000, $50,000 and $12,000," respectively, and therefore refers to the payment of money and not the making of a loan or the delivery of something else than money, namely, a thing of value.

The terms "money" and "thing of value," as used in Section 186 (a), are mutually exclusive. The phrase used

in the statute is "any money *or other* thing of value," so that "thing of value" obviously means something *other than money*. Since Holt received only money, as was expressly charged, the statutory term "other thing of value" and the verb "deliver," to which it relates, are utterly inapplicable.

In any event, it should not be assumed that Congress used these simple words "pay" and "deliver" loosely or ambiguously. As the Supreme Court held in *Bell* v. *United States*, 349 U. S. 81, 83:

> "About only one aspect of the problem can one be dogmatic. When Congress has the will it has no difficulty in expressing it—when it has the will, that is, of defining what is desired to make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit."

Had Congress intended to proscribe loans, it could easily, and should, have expressly done so—as it did 12 years later. Thus, when it defined the terms "contribution" and "expenditure," within the restrictive sections of the criminal statute pertaining to "Elections and Political Activities" (18 U. S. C. 591-612), Congress was not content with the words "gift" and "payment," but expressly included the word "loan" in both definitions (18 U. S. C. 591). Significantly, both definitions also contained the phrase—virtually identical with that in the instant statute—"money, or anything of value". Congress recognized that that phrase did not obviate the necessity of specifying a "loan".

Similarly, when Congress, in the Federal Corrupt Practices Act (2 U. S. C. 241 (d) and (e)), prohibited certain election contributions by national banks and other federal corporations, it expressly defined the term "contribution"

to include a "loan," as well as a "gift." Here again, Congress used the same phrase "money, or anything of value", but again did not rest thereon.

So, too, Congress, in proscribing financial benefits by bank officers to examiners, expressly included a "loan" (18 U. S. C. 217). Both this statute and 18 U. S. C. 591, above cited, were enacted in 1948, only one year after the Labor-Management Relations Act. This renders all the more significant Congress' omission from Section 186 of any reference to loans whatsoever.

The case of *United States* v. *Carter*, 311 F. 2d 934 (C. A. 6), decided on January 9, 1963, expressly held that a loan does not constitute a "payment or delivery" under Section 186 and that a loan was not proscribed by that section. This case will be hereinafter fully discussed.

The same interpretation of the same words in the statute was also made in *United States* v. *Baker*, 189 F. Supp. 796 (W. D. Pa., 1960), p. 801, n. 10, aff'd 293 F. 2d 613 (3rd Cir.), but without opinion by the Court of Appeals on this point. There the District Court instructed the jury that "if they found from the evidence that the defendant took money * * * as a loan * * * then the defendant should be found not guilty."

It is entirely immaterial that a loan may, as the Government has contended, be a "thing of value." It is the verbs "pay or deliver" which are inapplicable here—particularly under the clear authorities on the construction of statutes creating crimes which are merely *malum prohibitum*.

By parity of reasoning the reciprocal provision 186 (b) did not proscribe the receipt of a loan by a labor representative from an employer prior to its amendment on September 14, 1959.

Moreover, we contend that there was a variance between the allegations of the indictment and the proof adduced at the trial. The indictment charged that petitioners, Roth and Sternberg, paid or delivered to petitioner, Holt, "a thing of value, to wit: money in the amount of $30,000.00, $50,000.00 and $12,000.00" (the First, Third and Fifth Counts, respectively), and that petitioner, Holt received "a thing of value, to wit: money in the amount of $30,000.00, $50,000.00 and $12,000.00" (Second, Fourth and Sixth Counts, respectively). The proof adduced at the trials established that the transactions involved were loans and not the payment or delivery of money, in fatal variance with the allegations of the indictment.

The Supreme Court itself was concerned about the question of variance in this very area when in *United States* v. *Freuhauf*, 365 U. S. 146 at page 155, it said "* * * putting aside, of course, all questions of variance between indictment and proof that might emerge at a trial * * *."

On facts much weaker than those presented in the instant case, this Court in *Stirone* v. *United States*, 361 U. S. 212, reversed a conviction solely on the ground that the proof varied from the indictment with respect to the kind of interstate commerce which was effected by the defendant's acts—an allegation intended merely to establish federal jurisdiction—and not any of the substantive aspects of the crime.

As stated in *Stirone* v. *U. S.*, 361 U. S. 212, 217 (1960):

> "The indictment here cannot fairly be read as charging interference with movements of steel from Pennsylvania to other States nor does the Court of Appeals appear to have so read it. The

grand jury which found this indictment was satisfied to charge that Stirone's conduct interfered with interstate importation of sand. But neither this nor any other court can know that the grand jury would have been willing to charge that Stirone's conduct would interfere with interstate exportation of steel from a mill later to be built with Rider's concrete. And it cannot be said with certainty that with a new basis for conviction added, Stirone was convicted solely on the charge made in the indictment the grand jury returned. Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same. And the addition charging interference with steel exports here is neither trivial, useless, nor innocuous. Compare Ford v. United States, 273 U. S. 593, 602; Goto v. Lane, 265 U. S. 393, 402. *While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error.*" (Emphasis added.)

B. Federal penal statutes will be strictly construed.

It is well established at common law and by the federal courts that penal statutes, whether *malum in se or, a fortiori, malum prohibitum,* will be strictly construed in favor of the defendants. In *United States* v. *Carter,* 311 F. 2d 934 (C. A. 6), the Court expressly interpreted Section 186 (a) as not proscribing loans, stating at page 940:

> "The coverage of such a statute may not be extended beyond what clearly appears from its explicit language. Connally v. General Construction Co., 269 U. S. 385, 391, 46 S. Ct. 126, 70 L. Ed 322; McBoyle v. United States, 283 U. S. 25, 27, 51 S. Ct. 340, 75 L. Ed. 816."

In *North American Van Lines* v. *United States*, 243 F. 2d 693 (C. A. 6, 1957), citing *inter alia, United States* v. *Resnick*, 299 U. S. 207, it was stated at page 696:

> "• • • it has long been recognized that in the construction of a penal statute, all reasonable doubts concerning its meaning must operate in favor of the accused. Harrison v. Vose, 9 How. 372, 50 U. S. 378."

This rule was reiterated by Chief Justice Warren writing for a unanimous court, in *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U. S. 284, 98 L. Ed. 699 (1954). In refusing to extend the definition of "lottery" under Section 1304 of the United States Criminal Code to include radio and television give-away programs, the Court said

> "• • • it would do violence to the well established principle that penal statutes are to be construed strictly" (347 U. S. 296).

C. A statute creating a new crime, which is merely malum prohibitum and in derogation of the common law, must give the public fair warning in clear, everyday language, or the precise acts thereby made criminal.

Prior to the enactment of Sections 186 (a) and (b), it was not a crime for an employer to pay or deliver any

money or other thing of value to a representative of his employees or for such representative to receive or accept from the employer any money or thing of value. Since the statute proscribes and punishes acts which previously had the sanction of law, it is required to give the employer or union representative a clear and unequivocal warning, in language which the ordinary layman will understand, of precisely what acts are rendered criminal and will result in the deprivation of his liberty or property and, in this case, his impeccable reputation.

In *United States* v. *Carter*, 311 F. 2d 934 (C. A. 6), the Court held that Section 186 (a) did not give fair warning that a loan was proscribed, and accordingly a *bona fide* loan was not within its ambit. The court stated at page 940:

> "Were we here construing a statute relating to civil rights or remedies, it might be permissible to spend time considering whether, by construction, the word 'loan' could be added to actual words employed. Such a meaning, however, does not emerge with the clarity which should be found in criminal statutes. Winters v. New York, 333 U. S. 507, 515, 68 S. Ct. 665, 670, 92 L. Ed. 840, 849. We think it sufficient to refer to the language of Judge Martin, writing for this court in North American Van Lines, Inc. v. United States, 243 F. 2d 693, 696, 697 (C. A. 6, 1957). Citing decisions of the United States Supreme Court, we there said 'Impossible standards of specificity are not required, but the language of the statute (charging a criminal offense) must convey sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.' The statute here involved created a new offense not there-

> tofore known to statute or common law. The coverage of such a statute may not be extended beyond what clearly appears from its explicit language. Connally v. General Construction Co., 269 U. S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322; McBoyle v. United States, 283 U. S. 25, 27, 51 S. Ct. 340, 75 L. Ed. 816. We do not find, in the language employed, a Congressional intent to make a bona fide loan between parties described in the statute a crime."

In *McBoyle* v. *United States*, 283 U. S. 25, 27, Mr. Justice Holmes held that an airplane was not a "motor vehicle * * * or any other self-propelled vehicle not designed for running on rails," within the meaning of a statute penalizing the transportation of stolen vehicles. In unanimously reversing a judgment of conviction, the Court indicated that even in the case of a criminal who "it is not likely * * * will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given * * * in language that the common world will understand." It held that "the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies," or upon the speculation "that if the legislature had thought of it, very likely broader words would have been used." (*Ibid.*)

In the instant case, it is similarly irrelevant whether Congress, if it "had thought of it, very likely" would have included the word "lend." It did not give "fair warning" of any such intent.

The crime created by Section 186 was solely *malum prohibitum*. *United States* v. *Ryan*, 350 U. S. 299, 305; *Brennan* v. *United States*, 240 F. 2d 253 (C. A. 8), *cert. den.* 353 U. S. 931. Consequently, that statute must be

construed in accordance with the requirement that it give the employer or union representative a clear and unequivocal warning, in language which the ordinary layman will understand, of precisely what acts are rendered criminal and will result in the deprivation of his liberty or property and his reputation.

As the United States Supreme Court succinctly held in *Connally* v. *General Construction Co.*, 269 U. S. 385:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. * * * 269 U. S. at 391.
>
> " 'The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. * * * Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning' * * * " (269 U. S. at 393).

Even if Section 136 does not, as we contend, clearly exclude loans, unquestionably it does, at best, "admit of a double meaning," in which "the dividing line between what is lawful and unlawful" is not clear. Consequently:

> "(I)t is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.

> We should not derive criminal outlawry from some ambiguous implication." *United States* v. *Universal C.I.T. Credit Corp.*, 344 U. S. 218, 222.

Among the numerous other authorities to the same effect are: *Bell* v. *United States*, 349 U. S. 81 (*supra*); *United States* v. *Cardiff*, 344 U. S. 174; *United States* v. *McNinch*, 356 U. S. 595; *Iselin* v. *United States*, 270 U. S. 245; Hall, *Strict or Liberal Construction of Penal Statutes*, 48 Harv. L. Rev. 748, 765-66, and cases cited therein.

Thus, in *People* v. *Phyfe*, 136 N. Y. 555, the New York Court of Appeals held:

> "* * * if the terms of the statute will admit of two interpretations, that which will most nearly conform to the rules of the common law is in all cases to be adopted. * * * The citizen is entitled to an unequivocal warning, before conduct on his part, which is not malum in se, can be made the occasion of a deprivation of his liberty or property."

A very recent United States Supreme Court decision applying the doctrine of fair warning to criminal statutes and regulations involving business transactions is *United States* v. *Mersky*, 361 U. S. 431 (the dissenting opinions did not differ on this substantive point of law). The Court there held:

> "If the intent were otherwise, it should not have been left to implication. There must be more to support criminal sanctions; business-men must not be left to guess the meaning of regulations. The appellees insist that they changed the labels in good faith, believing their actions to be permissible under the law" (p. 441).

It is no distinction whatsoever that in the case cited the Court held that the defendants might reasonably have understood that the regulation in question was intended for one purpose (customs duties) rather than another purpose (truthful markings on imported goods). The Court so held even though the language of the statute did not disclose any such limited purpose. Certainly, the Appellants believe(d) their actions to be permissible under the law. Their belief was even more justified than was Mersky's, since loans are not expressly prohibited, whereas Mersky's acts were.

D. It would be contrary to all legal criteria and the facts to allow a broader construction of Section 186 to accord with what the Government infers to have been Congress' purpose or policy.

Any possible contention that the purpose of the statute requires that it be construed to include a loan, since a loan tends to engender the very same emotion—gratitude—in the representative, is patently untenable and irrelevant and is contrary to the overwhelmingly clear principles of criminal statutory construction previously demonstrated.

Congress evidently believed that a loan to a labor representative, which he intended to and did repay in full, did not have the same potential consequences as a gift. Moreover, in the absence of the unequivocal warning required (*supra*, subd. C), an inference of a broader congressional purpose is untenable.

In *Western Union* v. *Lenroot*, 323 U. S. 490, *supra*, the Supreme Court held that even a civil proceeding for violation of the Fair Labor Standards Act could not be predicated upon an unusual, though literal, interpretation

of the verb involved ("ship"). Its language is particularly pertinent:

> "Had the omission of a direct prohibition of this employment been called to its attention, it might well have supplied it, for any reason we can see. * * * it is beyond the judicial power of innovation to supply a direct prohibition by construction. * * * After all, this law was passed as the rule by which employers and workmen must order their daily lives" (p. 508).

The very simplicity and precision of the word "lend" render its omission from the instant statute most significant. To "supply a direct prohibition by construction" is to create judge made crime.

The Government made a very similar argument of underlying policy in *United States* v. *Cardiff*, and the Supreme Court vigorously rejected it (344 U. S. 174, 175-76):

> "The Department of Justice urges * * * that that construction is needed if the Act is to have real sanctions and if the benign purposes of the Act are to be realized."
>
> * * * * *
>
> "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid (cf. United States v. Cohen Grocery Co., 225 U. S. 81) may be as much of a trap for the innocent as the ancient laws of Caligula."

It is our contention, fully demonstrated by the facts and the authorities both in this and the succeeding Point, that Congress did not intend to proscribe loans in 1947.

However, it would be immaterial even if (1) Congress had not thought of loans and would have prohibited them if they had "been called to its attention" (*Western Union* v. *Lenroot, supra*), or, indeed, (2) if Congress' omission of loans were attributable solely to "inadvertence" on its part (*Iselin* v. *United States*, 270 U. S. 245, 251).

In further answer that a loan confers a benefit upon a recipient, and therefore, was made criminal, it is indisputable that there were many benefits which an employer might confer upon a representative which Congress did not proscribe. To take an illustration as close to a loan as any—a contract or undertaking of guaranty or suretyship by an employer on behalf of a representative would certainly be beneficial to the latter, but it is not prohibited by Section 186. Obviously, it was not Congress' intent to put the petitioners, Roth and Sternberg to the peril of determining whether the benefit accorded to petitioner Holt was sufficient.

That Congress did not include loans in any of the five exceptions set forth in Section 186 (c), is untenable, and begs the entire question. All of the transactions described in those exceptions would have been prohibited by the express language of Sections 186 (a) and (b) if they had not been excepted; all of them are, incontrovertibly, *payments* of money. On the other hand, it was unnecessary for Congress to except loans, for the very reason that they did not violate Sections 186 (a) and (b).

E. The legislative history of Sec. 186 supports a narrow construction, excluding loans from the acts prohibited thereby.

The Congressional debates on Section 186 and its forerunner, the Byrd amendment to the Case Bill, were unusually comprehensive, and extended into two Con-

gressional sessions (92 Cong. Rec. 4891 *et seq.*; 93 Cong. Rec. 4678 *et seq.*). Nevertheless, there was not the slightest mention of any prohibition against loans. Despite the detailed discussions of all of the potential consequences and implications of the statute, including certain highly conjectural and remote possibilities (*e.g.*, 92 Cong. Rec. 5499), not a single sentence in the lengthy deliberations of either House or of their committees intimates that Congress intended to proscribe actual loans to labor leaders. It is evident from the vigor and comprehensiveness of the debate on the bill that if any Congressman had thought that such loans were prohibited, he would certainly have questioned or commented thereon.

Furthermore, every Senator who sponsored the amendment declared that its "principal purpose" (although not its only one) was to regulate employers' contributions to union welfare funds, and that it was impelled by a demand which the United Mine Workers had made for such contributions (*e.g.*, 92 Cong. Rec. 4891, 5499; 93 Cong. Rec. 4678, 4746-47; Senate Committee on Labor and Public Welfare, 80th Cong., 1st Sess., 52-53—including remarks by Senators Taft, Byrd and Ball). Similarly, the various Senators who opposed the bill, spearheaded by Senator Pepper, enumerated a large variety of restraints which the statute might impose on all kinds of payments by employers to employees, but none of them referred even remotely to loans or transactions other than outright gifts and contributions (*e. g.*, 92 Cong. Rec. 4899, 5499; 93 Cong. Rec. 4748). The origin of the statute and the primary (even if not exclusive) motive of regulating contributions to welfare funds provide a restrictive criterion of construction and militate against the broad, over-all interpretation invoked by the Government. They fortify the conclusion that loans, as distin-

guished from gifts and contributions, were not in Congress' mind or purpose at all until it enacted the amendment on September 14, 1959 (*infra*, III).

III

The 1959 Amendment of Sections 186 (a) and (b) by expressly adding the word "lend" to the acts proscribed, evidences Congress' own understanding that the statutory prohibition had not theretofore encompassed a loan. The history of this amendment clearly indicates that the word "lend" was intended to add another proscribed act.

A. The amendment, its history and all of the circumstances of its enactment demonstrates this.

While it is clear from the foregoing discussion that Section 186, as it stood at the time of the offense charged, did not cover loans, any doubt which might possibly have existed has been utterly dissolved by the September 14, 1959 amendment of this section, which added, *inter alia*, the word "lend" to the prohibited acts.

In addition, the Congressional proceedings which preceded and accompanied the amendment of Section 186 in 1959 establish that Congress recognized that the 1947 Act did not cover loans. *United States* v. *Carter*, 311 F. 2d 934, 940 (more fully discussed hereinafter).

The 1959 amendments to the Taft-Hartley Act grew primarily out of the findings of the Senate Select Committee on Improper Activities in the Labor-Management Field (the "McClellan Committee"). Thus, Section 2 (b) of the preamble to the Labor-Management Reporting and

Disclosure Act of 1959, 73 Stat. 537, 29 U. S. C. 401 (b), states that:

> "The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives."

The Report of the Senate on the Act (No. 187, 86th Cong., 1st Sess.) states (p. 2):

> "The committee reported bill is primarily designed to correct the abuses which have crept into labor and management and which have been the subject of investigation by the Committee on Improper Activities in the Labor and Management Field for the past several years."

The Report of the Subcommittee on Labor of the House Committee on Education and Labor on the same legislation (No. 741, 86th Cong., 1st Sess.) sets forth the purpose of the Act in virtually identical language.

Among the disclosures made to the McClellan Committee in the course of its hearings were several instances in which employers had loaned money to representatives of their employees. Thus, the very loans here involved were the subject of extensive testimony (Hearings before the Senate Select Committee on Improper Activities in the Labor Management Field, July 1, 1959 at pp. 858-872).

In addition, a loan made by Freuhauf Trailer Co. to Dave Beck, a union officer, was the subject of extensive testimony in hearings before the McClellan Committee (Hearings Before the Senate Select Committee on Improper Activities in the Labor-Management Field, 85th Cong., 1st Sess., Part 7, at 2201-29). Moreover, loans by officials of a baking and candy company in Zion, Illinois, to James G. Cross, President of the Bakery and Confectionery Workers Union, the union which represented its employees, were found to have been made (*Id.*, Part 8, at 2857-60, 3010-12). Furthermore, James Hoffa of the Teamsters Union was found to have borrowed money from employers of teamsters, either directly or through labor relations advisers to such employers (*Id.*, Part 13, at 5267). Consequently, Congress, through the investigation which led to the amendment, became newly apprised of the existence of loans by employers or their agents to representatives of their employees.

That Congress in 1959 became substantially concerned with the prohibition of loans by employers directly to employee representatives is also clear from the fact that every comprehensive labor reform bill that was introduced at the session of Congress at which the amendment to Section 186 was passed (86th Cong., 1st Sess.) added an express prohibition against such loans, with the exception only of the administration bill (S. 748, H. R. 3540) which was not reported out of committee. S. 505, Section 112 (Kennedy-Ervin Bill); S. 1555, Section 211 (Kennedy-Ervin Bill with Senate Committee amendments); H. R. 8400, Section 502 (Landrum Bill); H. R. 8401; Section 505 (Griffin Bill); H. R. 8432, Section 505 (Elliott or House Committee Bill); and H. R. 8490, Section 505, each added the word "lend" to the acts prohibited by Section 186. Indeed, H. R. 4473, Section 213; H. R. 7265, Section 307 (b); S. 1137, Section 408(b) (McClel-

lan Bill), contained prohibitions against such loans in separate sections devoted solely to that purpose. Thus, every single member of Congress who saw fit to originate a proposal in this area felt that the inclusion of the prohibition against loans by employers to labor representatives was an essential element of new legislation.

The person most intimately connected with the labor reform legislation enacted by the 86th Congress was Senator Kennedy. He had served as a member of the McClellan Committee and was the co-author of the entire Labor-Management Reporting and Disclosure Act of 1959, which survived the legislative process in large measure without material change except in the form of additions (S. 505, S. 1555). He was its proponent on the floor and the manager of the bill during its passage through the Senate. He was chairman of the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, which considered and reported on the proposed legislation, and was a member of the conference committee which harmonized the House and Senate versions.

Senator Kennedy stated at the time of the introduction of S. 505, the so-called Labor-Management Reform Bill of 1959, which contained the amendment to Section 186, that one of the effects of the proposed legislation was that:

> "Sixth. The Becks and Hoffas will find future collusion with employers vastly restricted—with *no more loans* from employer groups, no more attacks on rival unions through middlemen like Nathan Shefferman, and no more secrecy shrouding the use of union funds to bail out a collaborating employer" (105 Cong. Rec. 885; emphasis supplied).

In that statement Senator Kennedy was expressing the same view he had held during the McClellan Committee hearings when commenting on the Fruehauf-Beck transaction. After describing in detail the Fruehauf-Beck loan, he advised the Committee:

> "*While there is no law against it*, I think the committee should take cognizance of the attitude that they took before this committee and recognize that they have a responsibility as well as rights in this matter." (Hearings before the Senate Select Committee on Improper Activities in the Labor-Management Field, 85th Cong., 1st Sess., Part 7, at 2403; emphasis supplied.)

During the hearings before the House and Senate Committees, similar views were expressed by witnesses who appeared before them. Senator Goldwater, a member of both the McClellan Committee and Subcommittee on Labor of the Senate Labor and Public Welfare Committee, stated in testimony before the Joint Subcommittee of the House Education and Labor Committee:

> "The Taft-Hartley Act prohibits certain types of payments by employers to labor unions or their agents as tending to corrupt or wrongfully influence them. Following this lead the bill *adds a prohibition on any loan as well.*" (Hearings before a Joint Subcommittee of the Committee on Education and Labor, House of Representatives, 86th Cong., 1st Sess., on H. R. 3450, etc., Part 4, at 1627; emphasis supplied.)

The President of the A.F. of L.-C.I.O., George Meany, expressed the same opinion to the House Committee:

> "Both these bills contain, in Section 107, provisions restricting loans from unions to their officers

> or employees, *and barring loans from employers to officers or employees of unions representing the particular employer's employees.* These provisions seem to us sound and desirable." (Hearings before a Joint Subcommittee of the Committee on Education and Labor, House of Representatives, 86th Cong., 1st Sess., on H. R. 3450, etc., at 103; emphasis supplied.)

The reports on the amendatory legislation of both the House and Senate Labor Committees are in accord that a purpose of the amendatory legislation was to close the existing loopholes with respect to loans. The Senate Report states:

> "Although these provisions of existing law would punish most forms of bribery or extortion if they were vigorously enforced by prosecuting officers, the testimony before the McClellan committee revealed loopholes which both employer representatives and union officials turned to advantage at the expense of employees. The Committee bill proposes to close the loopholes * * *." (S. Rep. No. 187, 86th Cong., 1st Sess., p. 13.)

The House Report (No. 741, 86th Cong. 1st Sess.) contains at page 46 the following description of the proposed amendment:

> "Under existing law it is illegal for an employer to pay or deliver anything of value to a representative of his employees, except in those instances permitted by subsection (c) of section 302. The purpose of these amendments to section 302 is to forbid any payment, *loan* or bribe by an employer, association, or anyone acting on an employer's be-

> half, i.e., labor relations consultant. The demand or acceptance of such payment, *loan*, or bribe is also proscribed." (Emphasis supplied.)

Similar statements on the floor of both Houses during the course of debate on the legislation indicate that the amendment was understood by all of the members to proscribe employer loans for the first time. In addition to his statement on introducing legislation, Senator Kennedy, just after the passage of the so-called Kennedy-Ervin Bill (S. 1555) by a 90 to 1 vote (105 Cong. Rec. 6745), stated:

> "* * * The basic provisions of the Kennedy-Ervin bill as it passed the Senate include the following * * *
>
> "Fifteenth. It prohibits loans by employers to unions or union officers" (105 Cong. Rec. 7021-2).

The proponent of the bill reported by the House Committee (H. R. 8432) was Representative Elliott, a member of the House Committee on Education and Labor. In a speech on the floor delivered in his behalf, he stated of the amendment to Section 302 (29 U. S. C. A. Sec. 186) by Section 505 of the bill:

> "This section, 505, *adds* to the existing proscription of section 302(a) the prohibition that the *employer* or his labor relations expert or consultant not pay or *lend*, or agree to pay or *lend* anything of value 'to any labor organization or any officer or employee thereof' which represents, seeks to represent, or would admit to membership any of (sic) employees of such employer; * * *" (105 Cong. Rec. 15550; emphasis supplied).

Robert F. Kennedy, Chief Counsel to the McClellan Committee, one of the men most familiar with the requirements for new legislation and author of a book reviewing the results of the investigation, *The Enemy Within* (Harper Bros. 1959), placed before the House of Representatives his views on the need for new restrictions in a letter sent to each member and read to the House during debate by Representative Metcalf. The letter, in pertinent part, read as follows:

"Dear Congressman:

I received your inquiry to my opinion of the various labor bills before the House of Representatives. I think it is appropriate, of course, that I limit my views to relating how the various bills match the findings and recommendations of the select committee.

Based upon those investigations and findings, my conviction has been that any bill, to be effective, must include:

* * * * *

3. Safeguards against secret conflict of interest transactions, by, or loans to, union officers * * *.

In my opinion, the bill that passed the Senate would effectively write these provisions into law, as would the Elliott bill in a comparable form—thus carrying out all the recommendations of the McClellan committee * * *.

Sincerely yours,

ROBERT F. KENNEDY,
Chief Counsel."

(105 Cong. Rec. 15687)

Senator Goldwater, who opposed the Senate Bill because he thought it was not strong enough (105 Cong. Rec. 6742, 6745), nevertheless agreed that the amendment to Section 302 did add a prohibition against employer loans. He said:

> "Section 302, as it presently reads, prohibits any such payment or delivery or money or other thing of value. This section adds a prohibition on any loan as well" (105 Cong. Rec. 10099).

Thus, the principal proponents of the amendment (Senator Kennedy and Representative Elliott), the Chief Counsel to the McClellan Committee (Mr. Kennedy), a leading representative of labor (Mr. Meany), as well as the respective committees of each House, and Senator Goldwater, who voted against the Senate Bill, all concurred in the view that the amendment expanded the statute to prohibit loans by employers, either directly or indirectly, to labor organizations or officers or representatives thereof.

To this is added the fact that although 163 members of Congress were members both when the amendment to Section 302 was passed, in 1959, and when the original section was enacted in 1947, not one of them even intimated that Congress had intended in 1947 to make Section 302 applicable to loans (complied from *Congressional Directory*, 86th Cong. 1st Sess., January 1959).

The statement of the Bureau of National Affairs, Inc., in its BNA Operations Manual entitled "The Labor Reform Law," published September 17, 1959, is accurate beyond question:

> "Types of payments. Section 302 (U. S. C., 186(a)) originally referred only to payments or

> deliveries or agreements to pay or deliver any money or other thing of value. The amendment adds loans and agreements to lend" (p. 39).

The evidence is overwhelming of legislative intent to add a proscription of employer loans where none existed before. The legislative history above reviewed amply demonstrates that Congress was also very much concerned with the problem of loans made by employers directly to labor representatives, and that the view of every one intimately connected with the legislation was that a proscription was being added against such activities.

B. The judicial authorities clearly confirm this conclusion.

As hereinbefore set forth, the Senate Report on the Kennedy-Ervin bill as amended states that "the testimony before the McClellan Committee revealed loopholes. * * * The Committee bill proposes to close the loopholes."

United States v. *Carter*, 311 F. 2d 934, is apposite. In that case the Court held that the inclusion of "lend" in sec. 186 by the 1959 amendment was conclusive that Congress had recognized that loans had not been covered prior to the amendment. The Court stated at page 940:

> "Congress, itself, recognized that it had not clearly expressed such intent when, in 1959, it amended the involved sections of the Act to specifically cover loans and lending (Sec. 505 of the Labor-Management Reporting and Disclosure Act of 1959). Such amendment was Congressional recognition that loans had not theretofore been covered. The United States v. Chase, 135 U. S. 255, 262, 10 S. Ct. 756, 34 L. Ed. 117; United States v. Curtis, 107 U. S. 671, 676, 2 S. Ct. 507, 27 L. Ed. 534; Fisher Flouring Mills Co. v. United States, 270 F. 2d 27, 28 (C. A. 9, 1959)."

Also compelling, is the decision of *Fisher Flouring Mills Co.* v. *United States*, 270 F. 2d 27 (C. A. 9), holding:

> "It is hornbook law that, where Congress has amended a statute to cover a 'loophole' the fact that an addition has been required is proof that the prior statute should be given a different construction" (270 F. 2d at 28).

The universal view that the addition of the words "lend" and "loan" to Section 186 substantively changed the statute so as to add a proscription where none existed before has been succinctly expressed in Aaron, *The Labor Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 851, 892 (1960):

> "It adds loans and agreements to lend to the types of payments already prohibited. It also adds the following to the list of recipients who may not receive such payments or loans."

Mr. Aaron further observed at pages 892-93:

> "The amended law will outlaw bona fide loans, openly made, by some employers to their employees. This is unfortunate, but scarcely a weighty argument against commendable objectives of the amendment."

This Court has consistently held that where a statute, and particularly a criminal statute, is amended so as to include an additional specification of the crime, the amendment is in effect a legislative declaration that the new specification was not theretofore unlawful.

In *United States* v. *Chase*, 135 U. S. 255, the defendant had been indicted for mailing an indecent letter under a statute which proscribed the mailing of a "book, pam-

phlet, picture, paper, writing, print or other publication of an indecent character." After the indictment was filed, the statute was amended to add "letters" to the list of prohibited matter. The United States contended that the term "writing" included letters. The Court, in ruling that the statute had not been violated, stated:

> "If letters were embraced in the statute on which this indictment was founded, why did Congress consider it necessary to insert the specific word to designate them in 1888? It must be that body did not put the construction on the prior statute claimed in behalf of the United States, else we have it doing a useless and vain act" (p. 262).

Similarly, in *Viereck* v. *United States*, 318 U. S. 236, a statute requiring the disclosure of propagandists' activities for foreign governments was amended after the acts for which defendant was indicted had occurred, so as expressly to proscribe the type of act for which Viereck was indicted. The Government argued (pp. 245, 247), that (1) the amendment was merely for the purpose of clarification, (2) to construe the original statute otherwise would have rendered it a "half-way measure," and (3) the Congressional Committee reports contained "no mention of the explicit restriction of the application of • • • the old Act" (in the instant case they do). Nevertheless, the Court, in reversing the Court of Appeals for the District of Columbia, held that the amendment extended the old statute and that the application, *ex post facto*, of the new as "not to be justified by denominating the amendment as clarifying or declaratory legislation" (p. 247).

Precisely to the same effect see:

United States v. *Curtis*, 107 U. S. 671;
Sarlis v. *United States*, 152 U. S. 570;
United States v. *Weitzel*, 246 U. S. 533.

Another striking pertinent decision is *People* v. *Cricuoli*, 157 App. Div. 201 (2nd Dept. 1913), where a defendant was charged with the unlawful possession of a "dangerous knife." The alleged weapon was a razor with a nicked or serrated edge. Although the statute, as it read at the time of the alleged commission of the offense, did not specify a razor, it used the generic term "a dagger, dirk or dangerous knife," and all of the standard dictionaries defined a razor "generally as a knife" (p. 203). By subsequent amendment the words "razor, stiletto, or any other instrument or deadly weapon" were added. The Appellate Division ruled that the trial judge had committed reversible error in charging the jury that, at the time of the alleged offense, the law encompassed a razor. It stated:

> "And the subsequent specification of 'razor' in addition to the term 'dangerous knife' is indication that there was not the legislative intent that the expression 'dangerous knife' should include a razor. Endlich on Interpretation of Statutes says (Section 366):
>
> "'Earlier Cognate Acts.—Where it is gathered from a later act that the Legislature attached a certain meaning to an earlier cognate one, this would be taken as a legislative declaration of its meaning there'" (p. 203).

This decision applies here with greater strength, since here there was a lapse of fully twelve years between the original enactment in 1947 and the amendment in 1959.

As succinctly stated in McKinney's Consolidated Laws of New York (Statutes, Book 1):

> "• • • if the change takes place after a considerable lapse of time and after the intervention of other sessions of the Legislature, it indicates an intention to supply some provisions not embraced in the former statute" (p. 268).

Similarly, the New York Court of Appeals held, in *People ex rel. Westchester Fire Ins. Co.* v. *Davenport*, 91 N. Y. 574, that if an amendment "takes place after a considerable lapse of time and the intervention of other sessions of the legislature, a radical change of phraseology would indicate an intention to supply some provisions not embraced in the former statute."

To the same effect: *Matter of Miller*, 110 N. Y. 216, 222.

This rule applies *a fortiori* to the amendment of a criminal statute. As was held in *American Laundry Machinery Co.* v. *Union Trust*, 153 Misc. 55:

> "The passage of the amendatory act was a legislative declaration that the previous section (36-a) did not apply to public improvements.
>
> • • • • •
>
> "As this section is a criminal enactment, it should be construed so as not to make acts crimes 'unless there is a clear and positive expression of the legislative intent to make them criminal.' People v. Shakun, 251 N. Y. 107, 113."

Since the Labor-Management Relations Act of 1947, of which Section 186 was part, constituted a new system of legislation, the Supreme Court's decision in *Addison* v. *Holly Hill Fruit Products*, 322 U. S. 607, 617, is pertinent:

> "Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive."

So too, in the instant case, investigations "reveal(ed) gaps or inadequacies" which in Congress' opinion "call(ed) for amendatory legislation." Here, too, Congress in 1959 felt that Section 186 "should have been made more comprehensive," and it then legislated accordingly. Here, moreover, the interest involved is not merely an administrative regulation—where the need for flexibility is inherent and desirable—but the liberty, property and reputation of honorable and respected citizens.

Thus, both the legislative history of the amendment to Section 186 and the effect given to such an amendment by all the authorities on the subject lead to the same conclusion—that Section 186 before its amendment did not proscribe the acts charged in the indictment.

C. Even if, contrary to the well established principles and authorities cited, the addition of the word "lend" in 1959 were construed as merely in clarification of the prior statute, that in itself would fortify our contention, in that the statute so construed did not satisfy the requirement of fair and unequivocal warning.

A possible contention that the addition of the words "lend" and "agree to lend" in Section 186 was intended for the purpose merely of clarifying the statute, not only

would fly in the face of all of the circumstances of its enactment, the authorities and common sense, but it would necessarily assume and concede that the original statute required clarification and, therefore, was not clear itself.

If Congress itself believed that its statute was not clear in its prohibition of loans, certainly that statute did not give fair and unequivocal warning to mere laymen, like these defendants. If the enactment of the amendment does not establish that the original statute did not proscribe loans, it shows, at the very least, that the statute did not give the requisite fair warning to the defendants that loans were proscribed.

IV

A loan is not proscribed by the statute. Accordingly, it is immaterial whether the loan could have been obtained through normal financial channels, whether interest was charged or collateral was given.

Any contention that the loans under indictment may have been more advantageous than the usual market loan, either as to interest or collateral can have no legal significance.

Every argument and every authority contained in II and III hereinabove, applies with unimpaired force and effect. Thus, the 1947 statute still fails to give the required fair and unequivocal warning that a loan intended to be and actually repaid in full, even though made on favorable terms, is proscribed.

Moreover, if Congress did not have in mind "loan" at all in 1947, *a fortiori*, it could not have intended the statute to proscribe an advantageous loan. Since "loan" was not intended by Congress to be proscribed, it is unrealistic to assume Congress nevertheless intended to include the sometime attributes thereof.

The history of the 1959 amendment following the disclosure of these very transactions and the precise facts as to interest and security leads to exactly the same conclusion: that Congress acknowledged in September, 1959, that the 1947 statute did not apply to these transactions. Consequently, an analysis of the substantive law leads inevitably to the conclusion that the supposedly beneficial attributes of these loans, with respect to the absence of interest and collateral, have no legal relevancy.

The case of *United States* v. *Carter*, 311 F. 2d 934 (C. A. 6), in addition to expressly holding that a loan was not proscribed by the statute as it existed prior to the 1959 amendment, ignored the supposedly beneficial attributes of the loan therein involved, to wit: the low rate of interest and the absence of collateral. These factors were regarded by the Court, *sub silentio* as having no significance.

In *Carter*, the agent of a subsidiary made a loan to a union representative of its employees. The parent corporation authorized the agent to make a loan but did not state whether interest would be charged or collateral would be required. The loan was made at the rate of three percent interest per annum and without collateral.

In reversing the conviction of the parent corporation, the Court held, among other things, that a *bona fide* loan was not proscribed by the statute prior to its amend-

ment. It further held that the only issue involved, therefore, was whether the alleged loan was, in true fact, an outright payment. It disregarded the low rate of interest and the absence of collateral. It further held that since the parent corporation had authorized a loan which the agent of the subsidiary transmuted into a gift, the parent was not guilty because it authorized a loan to be made, albeit the "loan" made by the subsidiary was at a low rate of interest and without collateral. The Court stated at page 941:

> "It is further argued that because of testimony by Carter that he got the permission of Zeidler, secretary of City Products, to make the alleged loan to Felice and because the District Judge, despite Zeidler's denial, found as a fact that Carter 'was authorized and directed by William Zeidler, a proper official of the City Products, to engage in the transaction here in dispute, prior to the delivery of the money to Felice,' City Products is guilty as a principal. It is clear, however, that the only evidence of Zeidler's participation in the events occurring prior to and at the time of the alleged offense was his consent to Pilsener Brewing Company making a loan to Felice. We have held that a bona fide loan to a union representative was not proscribed by the statute, as it read in 1956. We do not believe the evidence would justify an inference that Zeidler, at the time he gave his consent, knew that such loan was but a cover for an illegal payment to Felice.
>
> City Products' motions for acquittal should have been granted. This disposition of City Products' appeal makes it unnecessary to discuss other errors assigned by it."

Reasons for Granting the Writ
(Insofar as Petitioner Holt Is Concerned)

V

Petitioner Holt was deprived of his constitutional and fundamental right to waive a jury trial.

Petitioner Holt wishes to emphasize that his claim raises a serious and far-reaching constitutional question, which ought to be but never has been decided by this Court. Petitioner Holt claims that his fundamental right to demand a jury trial in a criminal case includes the right to refuse a jury trial and that this basic right can not be abridged by making it dependent upon the consent of the government or the Trial Judge for the following reasons:

(1) Historically and at the time of the adoption of the Constitution, the right of a defendant to waive a jury trial was recognized.

It has been established and recognized in the federal courts that a defendant in a criminal proceeding may waive his constitutional right to a trial by jury. *Patton* v. *United States* (1930), 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854, 70 A. L. R. 263. Furthermore, the defendant has the right to try his own case without a jury even without the benefit of counsel, *Adams* v. *United States ex rel. McCann* (1942), 317 U. S. 269, 63 S. Ct. 236, 87 L. Ed. 268, 143 A. L. R. 435.

The question here presented is whether the constitutional rights of the petitioner Holt were violated when his

request to waive a jury trial was denied because the government refused to consent to such waiver.

It is important to note that in early English common law the accused could refuse a jury trial even though the government sought to compel him to submit to a jury trial by using various means, including torture. Later development of the jury system was such that it became a protection of the accused against government oppression and thus the accused's right to a jury trial was adopted in our Constitution, because of the benefits to the accused.

The case of *Patton* v. *United States* (*supra*), clearly recognizes the right of an accused to waive a trial by jury and comprehensively disposes of all the arguments used against such waiver. The court states at page 298: "*Upon this view of the constitutional provisions we conclude that Article III, Section 2, is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election. To deny his power to do so, is to convert a privilege into an imperative requirement.*" (Emphasis added.)

Amendment VI of the United States Constitution provides in part, as follows: "* * * *The accused shall enjoy the right to* * * * *trial by an impartial jury.* * * *"*

In construing the Constitution and particularly the Bill of Rights, it must be remembered that they were designed to protect the rights of the people, and did not create these rights. They are based upon the concept that the people are endowed with certain inalienable rights which include the rights to "* * * *life, liberty, and the pursuit of happiness* * * *" [Declaration of Independence] and that these rights existed before the Constitution was written.

This Court has held that there is "* * * *nothing in the Constitution to prevent an accused from choosing to have his fate tried before a judge without a jury, even though, in deciding what is best for himself, he follows the guidance of his own wisdom and not that of a lawyer*", *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 275.

Unfortunately, the well-reasoned opinion of the court in the *Patton* case, *supra*, becomes confused by the *obiter dicta* at the end thereof, where the court added gratuitously that the approval of the court and the consent of the government counsel would be required. We respectfully submit that this latter portion of the opinion is without any legal or historical basis and is inconsistent with the rest of the opinion. It appears to be an afterthought without supporting authority. What good is the accused's right to waive a jury trial if the government counsel, who is doing his utmost to convict the accused, can thwart the efforts of the accused and his counsel? Does this not "convert a privilege of the accused into an imperative requirement" which the court had stated could not be done?

The whole purpose of these constitutional provisions is to protect the accused, particularly against oppression by the government. It is therefore arbitrary, unreasonable, and a deprivation of his constitutional rights to compel him to have a jury trial against his wishes, just because the government or the Trial Judge insist upon it. As the court, through Justice Frankfurter, stated in *Adams* v. *United States ex rel. McCann*, *supra*, at page 279: "*What were contrived as protection for the accused should not be turned into fetters*" (Emphasis added).

(2) The right of an accused in a criminal case to demand a jury trial necessarily includes the right to refuse a jury trial.

As we have heretofore shown, historically this right to waive a jury trial was recognized, and logically in drawing the Constitution there was no more need or reason to add words recognizing the right to waive a jury than it was necessary to add such words of waiver to any other constitutional right. The right to demand necessarily implies the right to refuse, *People* v. *Spegal* (Ill. Sup. Ct. 1955), 5 Ill. 2d 211, 218; *People* v. *Fisher*, 340 Ill. 250. 257, 172 N. E. 722 (1930). As the court stated in *People* v. *Spegal*, 5 Ill. 2d 211 at p. 218, *"The power to waive follows the existence of the right, and there is no necessity of guaranteeing the right to waive a jury trial"*. Also, this is the view in the *Patton* case expressed as follows: *"To deny his power to do so, is to convert a privilege into an imperative requirement."* *Patton* v. *United States*, 281 U. S. 276, 298.

(3) Since a defendant can plead guilty and waive any trial whatever without the consent of the Government, he must necessarily have the right to waive a trial by jury without Government consent.

This proposition is supported by *State ex rel. Warner* v. *Baer* (1921), 103 Ohio St. 585, 589, which is cited with approval in *Patton* v. *United States*, 281 U. S. 276 at p. 291. Many courts have recognized the constitutional right of an accused to waive a trial by jury.

People v. *Duchin*, 230 N. Y. S. 2d 670;
Munsell v. *People*, 122 Colo. 420, 422, 222 P. 2d 615;

State v. *Hernandez*, 46 N. M. 134, 123 P. 2d 387;
State v. *Harvey*, 117 Oregon 466, 242 Pac. 440, 444;
Commonwealth v. *Petrillo*, 340 Pa. 33, 16 A. 2d 50;
People v. *Scuderi* (1936) 363 Ill. 84, 1 N. E. 2d 225, 227;
State v. *Zebrocki* (1935), 194 Minn. 346, 260 N. W. 507, 508;
State ex rel. Warner v. *Baer*, 103 Ohio State 585, 612 (1921).

(4) Since a defendant can waive other important constitutional rights without the consent of the Government, he must necessarily have the right to waive a jury trial without Government consent.

It has been held that the defendant may waive other important constitutional provisions such as confrontation of witnesses and assistance of counsel without Government consent. Accordingly, there is no valid basis for restricting the defendant's right to waive a jury trial since the power to waive follows the existence of the right itself. *People* v. *Spegal* (Ill. Sup. Ct. 1955), 5 Ill. 2d 211, 218, 125 N. E. 2d 468, 51 A. L. R. 2d 1337.

It has been held that there is "*nothing in the Constitution to prevent an accused from choosing to have his fate tried before a judge without a jury* * * *." *Adams* v. *United States ex rel. McCann* (*supra*); *Naples* v. *United States*, 307 F. 2d 618, 625, 626 (D. C. 1962).

(5) The constitutional provisions in respect to jury trials are for the protection of the interests of the accused and not the Government; there is nothing in the Constitution giving the Government the right to demand a jury trial.

As the court states in the *Patton* case, "* * * it is reasonable to conclude that the framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused", *Patton* v. *United States,* 281 U. S. 276 at p. 297. It is also stated that, "The right to trial by jury was uniformly regarded as a valuable privilege bestowed upon a person accused of a crime for the purpose of safeguarding him against the oppressive power of the King and the arbitrary or partial judgment of the Court", *Patton* v. *United States,* 281 U. S. 276, 296.

Thus, to require the consent of the Government before defendant can waive a jury trial in effect destroys the defendant's right and gives the Government a right to demand a jury trial. This has been held in the case of *People* v. *Spegal,* 5 Ill. 2d 211, where the court states at page 218, as follows:

> "* * * that the prosecution's consent is necessary to make such a waiver effective is inconsistent with the defendant's acknowledged power, enables the state to nullify his act and reduces his power to waive a jury trial to a shadow * * * The power to waive follows the existence of the right and there is no necessity of guaranteeing the right to waive a jury trial."

The Court of Appeals of the State of New York recently decided this question in favor of the defendant in

People of the State of New York v. *Harold Duchin*, 239 N. Y. S. 2d 670 wherein the New York State Constitution required the consent of the court for the defendant to waive a jury trial. Judge Fuld, in writing the majority opinion said:

> "Our dissenting brethren take the position that the trial judge has an uncontrolled discretion to refuse to approve a defendant's application for a waiver of a trial by jury * * * . *The provision is designed for the benefit of the defendant. When, choosing to be tried by a judge alone, he requests a waiver, he is entitled to it as a matter of right* once it appears to the satisfaction of the judge of the court having jurisdiction that first, the waiver is tendered in good faith and is not a stratagem to procure an otherwise impermissible procedural advantage—such as, for instance, a separate trial on an indictment involving several defendants jointly charged with the commission of crime (citing)—and second, that the defendant is fully aware of the consequences of the choice he is making * * *.
>
> "An accused who admits his guilt and does so with full appreciation of his act may not be compelled to stand trial against his will. And, if this be so, certainly, *a defendant may not be forced to a trial before a jury if it sufficiently appears that his election to be tried without one was made knowingly and understandingly, based on an intelligent, informed judgment.*" (Emphasis added.) Cf. State cases to the same effect: *Grady* v. *State*, 35 SW 2d 158 (1931) Texas; *Baader* v. *State*, 77 So. 1002 (1917) Ala.; *People* v. *Spegal*, 125 NE 2d 368 (1955) Ill.; *State* v. *Worden*, 33 Am. Re. 27 (1878) Conn.

(6) The defendant has a right to safeguard himself against oppression or partiality of a jury and to decide what is best for himself.

It has been recognized that there are occasions when a jury might be influenced by passion, prejudice, or public feeling, or lack sufficient knowledge, experience or insight to give the defendant a fair trial. Often, the subject matter may be too technical or too involved for a jury. This has been aptly expressed as follows:

> "Clearly this right is for the benefit of the accused. If he regards it in the particular case as a burden, a hardship, a prejudice to a fair trial, why in the name of reason should he not be permitted to waive it and submit his cause to the magistrate. The local atmosphere with which the jurors are more or less impregnated may not in his judgment have reached the magistrate. He may have the highest confidence in his sense of fairness and justice in determining the facts of his cause, and *what was given to him generally, as a shield, should not be used as a sword* in case he feels that a jury trial in such case would so result." *Hoffman* v. *State*, 908 Ohio St. 137, 146-147 (1918). (Emphasis added.)

The right of the defendant is further expressed in the following opinion:

> "The right of an accused person to a jury trial is absolute to the extent that he may have such a trial by claiming it or even by withholding his consent to proceed without it. The State owes to a person charged with a crime a fair and impartial trial, including a strict compliance with every con-

> stitutional guaranty, *but it is not obliged to force upon him the acceptance of rights and privileges in the face of his desire, informed and expressed, to waive them.*" *People v. Fisher*, 340 Ill. 250, 257, 172 N. E. 722 (1930). (Emphasis added.)

The basic question is, should not the defendant have the right to make the ultimate decision as to demand or waiver of a jury trial. This view is held by Justice Frankfurter who stated the following in *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, p. 275: "*And since trial by jury confers burdens as well as benefits, an accused should be permitted to forego its privileges when his competent judgment counsels him that his interests are safer in the keeping of the judge than of the jury*". and at page 279, the court goes on to state: "*What were contrived as protections for the accused should not be turned into fetters.*" In that case, the defendant did not even have counsel when he waived the jury. Certainly, this principle would apply all the more where the accused through capable counsel requests a waiver of jury trial.

(7) To compel a defendant in a criminal case to undergo a jury trial against his will is contrary to his rights to a fair trial and the provisions of the Constitution.

The Fifth Amendment to the Constitution provides, in part, as follows:

> "No person * * * shall be deprived of life, liberty, or property, without due process of law."

It is our contention that where the defendant is compeled to undergo a jury trial against his will and against the will of his counsel, there is a violation of the "due

process clause" of the Fifth Amendment as well as of other constitutional provisions.

This provision protects the right of a defendant to a fair hearing, *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 50. It supplements the procedural guarantees in the Sixth Amendment and in the preceding clauses of the Fifth Amendment for the protection of persons accused of crime. *Constitution of the United States, Senate Document No. 170* (1953 Ed.), p. 847.

The case of *Gideon* v. *Wainwright*, 372 U. S. 335, 339, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), emphasizes that, "• • • due process is a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights," and that the due process clause relates to the concept of the accused having a fair trial and the protection of the fundamental rights of an accused. It is further held that due process, "• • • in *safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions.*" *Mooney* v. *Holohan*, 294 U. S. 103, 112 (emphasis added).

Therefore, in applying the test of due process to this case, we submit that since the petitioner had a right to waive a jury trial, it became a mockery to make this right dependent upon the consent of the government and the Trial Judge and his constitutional rights were thereby violated.

This court granted certiorari on this very question on April 22, 1964 in *Singer* v. *United States*, 32 U. S. L. W., 3365, 4/21/1964. (See footnote of opinion of the court below.) (H-5)

VI

Rule 23(a) of the Federal Rules of Criminal Procedure is constitutionally invalid particularly insofar as it limits the right of the defendant to waive a trial by jury by requiring the consent of the Government and the Trial Judge thereto.

The constitutionality of Rule 23(a) of the Federal Rules of Criminal Procedure is a matter of far-reaching importance and applies to practically all federal criminal cases. It involves serious and far-reaching constitutional questions which ought to be, but never have been decided by this Court.

Nowhere in the Constitution is the Government given the right to demand a jury trial in a criminal case. Yet by Rule 23(a) the Government, in effect, exercises the right to demand a jury trial and to compel the defendant to undergo a jury trial against his will. We can find no historical, legal or logical basis for giving the Government such a right. Since Rule 23(a) operates to abridge the defendant's right to waive a jury trial, it violates his constitutional rights under the Fifth, Sixth, Ninth and Tenth Amendments to the Constitution.

Patton v. *United States* (*supra*), was a case in which the government *stipulated* with the defense that a felony trial should continue with eleven instead of the original twelve jurors. The stipulated jury of eleven convicted the defendant, and the United States Supreme Court affirmed. As a matter of fact, the opinion in the *Patton* case comprehensively supports the arguments in favor of petitioner's right to waive a jury trial. The only portion adverse is the *obiter dicta* at the end of its opinion which

cites no authority and has no valid basis and does not settle the issues before this Court.

Writers on the law, who have considered the point, have denounced the Rule 23(a) requirement of consent by the prosecutor as procedurally unconstitutional:

> "While the rule requires the consent of the Government to a waiver of a jury trial, as far as the author is aware, the Government has ordinarily considered giving such consent a pro forma routine matter and has generally granted it as of course without discussion. Obviously the prosecution should be interested only in seeing that justice is done and should have no interest in the choice of the mode of trial. A prosecuting attorney should not be a partisan advocate representing a client. He is an officer whose function is to assist in attaining a just result, whether it be a conviction or an acquittal. Many years ago an eminent Solicitor General of the United States observed that 'the Government always wins a case when justice is done to one of its citizens.'
>
> "After all the right to trial by jury is a constitutional right of the defendant alone. It is intended to be a privilege of the accused. The prosecution has no constitutional right to a trial by jury, and the requirement that it give its consent to a waiver is a purely procedural rule and has always been regarded as such.
>
> "The author urges that Rule 23(a) of the Federal Rules of Criminal Procedure be amended by striking out the requirement of a consent of the Government to a waiver of a jury trial."

> *"A Criminal Case in the Federal Courts"* by Alexander Holzoff, cited in the West Publishing Co. edition of the 1960 *Federal Rules of Criminal Procedure,* pp. 17-18.*

The federal courts have the power as well as the duty to declare invalid federal rules of procedure which are unconstitutional and should do so in this case.

Rule 23(a) is also invalid on another ground. Although the Supreme Court has been given the power to prescribe rules of pleading, practice, and procedure, it has no power to change the *substantive* rights of a defendant, *Baker* v. *United States* (1944), 139 F. 2d 721 (C. C. A. 8th); *Mississippi Publishing Corp.* v. *Murphree* (1946), 326 U. S. 438; *United States* v. *Sherwood* (1940), 312 U. S. 584.

This principle is set forth in *Federal Criminal Practice Under the Federal Rules of Criminal Procedure,* by William M. Whitman at page 6, as follows:

> "However, the (Federal Rules of Criminal Procedure) govern practice and procedure only; the authority of the Supreme Court to prescribe rules of procedure does not empower the court by a procedural rule to deprive a person of a substantive right granted by law."

We respectfully submit that the right to waive a jury trial in a criminal case is a substantive right which cannot be abridged by rule of court.

This Court granted certiorari on this very question on April 20, 1964 in *Singer* v. *United States,* 32 U. S. L. W.

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* The author is a United States District Judge for the District of Columbia and former Chairman of the Section of Judicial Administration of the American Bar Association.

3365 (4/21/64—see footnote of opinion of the Court below). (H-5)

VII

The Court erred in denying Holt's motion to disqualify the Trial Judge after the Trial Judge, *sua sponte*, had disqualified himself from trying this case without a jury.

On May 23, 1963, two days after the completion of the trial of *U. S.* v. *Roth and Sternberg,* counsel for petitioner Holt and the Assistant U. S. Attorney appeared before the Trial Judge. *Both sides informed the Court that each was willing to waive a jury* (H-a 6a). At that time, the Trial Judge stated that it occurred to him that it might present a problem because he had heard all the evidence against the employers, Roth and Sternberg, and had seen a jury return a verdict of guilty. He felt that perhaps he should send the case back to Room 318 for reassignment to another judge (H-a 12a).

After a few minutes of discussion, the Judge requested counsel to return about 11:30 A.M. At that time, counsel for the Government reversed themselves and informed the Court that they were no longer willing to waive a jury. The Judge again discussed the advisability of sending the case back for reassignment but asked counsel to return at 2:30 P.M. for a final decision. At that time the Trial Judge decided to keep the case for a trial by jury despite Holt's motion that he disqualify himself.

In denying this motion, the Trial Judge set forth his reasons for refusing to try this case without a jury:

"The Court: * * *

I do not think that I would be unfair, even if we were to proceed without a jury. What I really mean to convey to you is that though I feel that way, it might not turn out to be so in human terms.

"In other words, I do not want to indicate to you that I flatly feel that I would not listen to the evidence fairly, even if I were sitting without a jury.

"What I want to make sure of is, notwithstanding that statement of disclaimer, if you will, I said this morning, and I say again, it might not in human or psychological terms work out that way" (H-a 8a-9a)."

Holt's counsel pointed out to the Trial Judge that his inability to try this case without a jury would influence his judgment with a jury, on any motions made by defense counsel at the end of the Government's opening, on rulings on evidence during the trial, on any motions made at the end of the Government's case, on any motion made at the end of the entire case, and more particularly with respect to any charge to the jury and any motion to set aside a jury's verdict (H-a 7a-8a). All of these motions were made and denied by the Trial Judge in a case described by him as "a very, very thin case proofwise at best on particularly Counts * * * 4 and 6" (H-a 116a) and "I must admit if I have to look around for a thin case proofwise, I would have to pick this case as the bell-hound of that field" (H-a 115a).

Due process of law acquires that a case be tried before an impartial and disinterested Tribunal. The law's intention is that no judge shall preside in a case in which he is not entirely free, disinterested, impartial and indepen-

dent. *Tumney* v. *Ohio,* 273 U. S. 510 (1927). It would seem that the principle that every litigant has a right to be tried before an impartial judge, would mean that any doubt on that score should be resolved in favor of the party raising the point on *bona fide,* substantial and significant grounds.

The present case is not one in which the particular judge's refusal to act would destroy the only Tribunal in which a determination of the proceeding could be had. In fact, the Court itself suggested that reassignment in Room 318 might solve the problem.

Nor does inconvenience to the assignment calendar predicate sufficient reason for holding a case where, as here, *the Court itself raised the question of possible partiality,* because of the prior, related trial.

Here the *Court* was not convinced that it could impartially hear the case because its subconscious motivation might not allow it. But once the Court announced such serious reservation in properly discharging its duty, it could not then insulate itself or its motivation by interposing a jury for the hearing of the trial. At that point, the Court would be disqualified under *all* circumstances.

Particularly applicable to this situation is *U. S.* v. *Valenti,* 120 F. Supp. 80, 92 (D. C. N. J. 1954), where the Court struggled with its own problem, and unlike the present situation, flatly stated that the matter before it "did not affect or influence the Court in any manner adverse to the defendant." In that case, the Court was considering an affidavit submitted pursuant to 28 U. S. C. A. Section 144. After an exhaustive discussion of the precedents and its own feelings, the Court concluded that it must disqualify itself.

"It is worthy of note also, that it is not only the right, but the sworn duty of a trial judge to preside in a particular matter within the jurisdiction over which he is the presiding officer when there is no legally sufficient foundation in fact and basis in reason and law for his disqualification or recusation (footnote). Personal predilections of a trial judge in this regard are immaterial where his qualifications to preside in a particular proceeding are called into question by a party on asserted grounds of personal bias or prejudice; but he may recuse himself, sua sponte, for compelling moral reasons, or where there exists in his own mind some real doubt as to the impartiality which he, as an individual, may exert on the matter then before him as a judicial officer.

" * * * And human nature being what it is, and being projected as it must through individual personalities, it is imperative that those entrusted with the awesome responsibility of administering justice should so far as is reasonably possible insure the fullest measure of dispassionate consideration and impartiality, rather than chance even the slightest taint or opprobrium however obscure, albeit real, to cast a shadow or divert the fullest, fairest, impartial trial of the innocence or guilt of an accused in accordance with the every fundamental tenets of law, the highest ideals of our Anglo-American jurisprudence, and traditional concepts of justice."

In the present situation, the Judge's bias, as stated referred to his mental attitude or disposition toward the defendant in this prosecution because of his prior knowledge of the facts, and indicated that he perhaps felt an

undue favoritism toward the Government's case. It was therefore enough that the Judge's bias, for whatever cause, tended to deprive him of his impartial status. The gravamen of the "feeling" that the District Judge expressed is that it rendered him, he felt, unable to exercise his functions impartially. Having once disqualified himself from hearing the case without a jury, with cause, it is submitted that it was error for the District Judge to retain control and try the case with a jury. Cf. *Stringer* v. *U. S.*, 233 F. 2d 947-948 (9 Cir. 1956).

VIII

The proof was insufficient for conviction in that the Government failed to prove that Holt had any knowledge of the transfer of funds by the employers to Adams Associates, who in fact loaned the moneys to Holt. The Trial Judge refused to charge that this knowledge by Holt was a necessary element for conviction. The Trial Court erroneously admitted hearsay evidence of the transfer of funds between Valley Commercial and Adams Associates.

A. The proof was insufficient for conviction in failing to prove knowledge by Holt that the funds came from the employers.

Counts Two, Four and Six of the indictment charge that Milton Holt did receive and accept the employers, a thing of value, to-wit, money in the amounts of $30,000.00, $50,000.00 and $12,000.00, respectively.

The Government proved that Adams Associates, not an employer, loaned $30,000.00, $54,600.00 and $12,000.00 to Milton Holt, all of which loans were repaid. The Gov-

ernment proved that Holt came to see Frank Abrams of Adams Associates at the sugestion of Herbert Sternberg, an employee of the employer, Continental Vending. The Government also proved, over objection of defense counsel, that on each occasion, Sternberg had a conversation with Abrams requesting Abrams to make the loan to Holt. The Government also proved, over objection, that Valley Commercial, a finance company owned by the employers, transferred $30,000.00 to Adams Associates at the time of the $30,000.00 loan and $50,000.00 at the time of the $54,600.00 loan. There was no proof submitted that Valley Commercial transferred any funds to Adams Associates in connection with the $12,000.00 loan.

The Government failed to prove that Holt had any knowledge of the conversations between Sternberg and Abrams or that Holt had any knowledge of the transfer of funds from Valley Commercial to Adams Associates. The record is clear that it was the intent of Sternberg and Abrams that Holt should not know of the transfer of funds from the employer to Adams Associates:

> "Q. So that you understood, did you not, Mr. Abrams, that when Mr. Sternberg spoke to you he wanted this loan to come from a stranger so that Mr. Holt would not know that it came from Valley Commercial? A. That is correct.
>
> "Q. And the same is true about every other loan? A. Yes, sir" (H-a 77a).

That the Government knew that it was required to and intended to prove this essential element of the case is apparent from its opening:

> "This (Adams Associates) was a private finance company and the Government will show, through its proof, that through the devise of Adams Asso-

> ciates, from Mr. Frank Abrams (sic) that this was the instrument used by these corporate employers to *transfer* these forbidden things to Mr. Holt. They transferred them indirectly through Adams Associates.
>
> "Now, let's see what happened on these three different occasions.
>
> "The employers used Adams Associates to *transfer* the sums alleged. These are the forbidden things of value which we say violate the statute.
>
> "On October 18, 1957, through this instrument, Adams Associates, they transferred $30,000 to Milton Holt. On April 15, 1959, they transferred $50,000 and on May 1, 1959, $12,000" (H-a 34a-35a). (Emphasis added.)

But the Government recognized that it failed to prove its case according to the terms of the indictment, when in his summation, the Assistant United States Attorney said:

> "Now incidentally, we do not have to prove that Holt knew this came from Valley to Adams" (R. 2153).
>
> * * * * *
>
> "We don't have to prove that he knew it came from Valley through Adams but you still can infer from the facts that he did" (R. 2162).

There were no facts in the record from which the jury could infer that Holt knew the money came from Valley through Abrams, and the Government was in error when it said "we don't have to prove that he (Holt) knew it came from Valley through Adams".

The applicable rule is stated in *U. S.* v. *Ryan*, 128 F. Supp. 128, 133 (S. D. N. Y. 1955) rev'd 225 Fed. 2d 417 (2 Cir. 1955) rev'd 350 U. S. 299 (1956) on rehearing 232 Fed. 2d 481 (2 Cir. 1956):

> "In my opinion a wilful violation of Section 186(b) is proved if it is shown that a 'representative of any employees who are employed in an industry affecting commerce' received or accepted money *from the employer of such employees with knowledge (1) that he was receiving or accepting money, and (2) that the person who was giving the money was an employer of employees that he represented.*" (Emphasis added.)

On rehearing by the Second Circuit following the reversal by the Supreme Court on other grounds, the Court of Appeals by the language of its decision, recognized that knowledge was an essential element of the crime and that it is incumbent upon the Government to establish such knowledge of the defendant. *U. S.* v. *Ryan, supra* (232 Fed. 2d at 482).

The Government has in fact conceded the requirement by the very language "knowingly" in the indictment. It does no more than confirm the *Ryan* statement, *supra*, and the requirement laid down for employers under 29 U. S. C. 186(a):

> "To render a verdict of guilty in this case, however, a jury must find defendant effectuated these payments knowingly and wilfully. In other words, a guilty verdict must be based *on evidence in the record* tending to demonstrate defendant's knowledge, at the time of the payments * * *." *U. S.* v. *Fabrizio*, 193 F. Supp. 446, 447 (D. C. D. Del. 1961). (Emphasis added.)

The *Fabrizio* opinion, *supra,* rendered a judgment of acquittal based, in the main, upon the same weakness inherent in the case at bar:

> "* * * the Government while proving the payments, has failed to connect them sufficiently with defendant." at p. 448.

No different proof is required for conviction under 29 U. S. C. 186(b). Further, neither Sections 186(a) nor 186(b) of Title 29 U. S. C. require or presuppose mutuality of guilt. *Arroyo* v. *U. S.,* 359 U. S. 419, 423 (1959).

B. The Trial Court refused to charge that knowledge was an essential element for conviction.

The Court misconstrued the fact that proof demonstrating the payment of monies by the employer to a third party and a receipt of money by the representative does not, of itself, demonstrate knowledge by the representative that the employer was the source.

The Court specifically refused to accept the defendant's request to charge to this effect or to cure its own charge to the Jury:

> "I except to those portions of your Honor's charge which would permit the jury to find the defendant Holt guilty on the basis of having received a one-sided favor or favors from Adams Associates at the request of Sternberg without any finding by them that Holt knew that Valley Commercial Corporation had transmitted moneys for the loan or loans to Adams Associates.
>
> "We respectfully submit that a finding of knowledge with regard to the transfer of these funds is essential here.

"The Court: I agree with you, but not knowledge to that effect.

"Mr. Karger: That is the point we are making. We respectfully submit that this is the law.

"The Court: All right.

"Mr. Karger: We respectfully submit further that not only are the instructions that your Honor gave on this point contrary to law, but it also amounts to an unpermissible attempt to amend the indictment by substantially altering and enlarging the charges presented by the grand jury.

* * * * *

"In other words, we are objecting to the submission to the jury of the case on the theory that here could be a one-sided benefit or thing of value conferred on the defendant Holt other than funds of the employer.

"The Court: I understand. Denied" (H-a 147a-148a).

Thus the exception was not only rejected but was in effect pronounced as non-essential and concededly omitted from the Court's charge on the point:

"If you find beyond a reasonable doubt that each of the three elements which I have discussed up until now is present with regard to a particular count, then you can address yourself to the fourth and final element, that is to say, the element which the Government must also prove beyond a reasonable doubt, that Milton Holt received a thing of value knowing that it was, in fact, a thing of value and that it was being conferred upon him by an employer of employees represented by him (H-a 129a).

* * * * *

> "Assuming that a thing of value was conferred upon Mr. Holt and assuming, further, that this was done on behalf of an employer company or companies, did Mr. Holt actually know when receiving this thing of value both that it was a thing of value and that it was being conferred on behalf of an employing company or companies employing workers represented by him, Milton Holt" (H-a 139).

The jury could properly, as it did, construe that the loans were being " * * * *conferred on behalf of an employing company* or companies employing workers represented by him, Milton Holt." (Emphasis added.) So far as the proof admitted was concerned, it was being *conferred* on Holt *because of the intervention of the* company, Valley Commercial and Sternberg. It is clear that the instruction, in making Valley Commercial's and Sternberg's intercession on Holt's behalf the essential element to be found by the jury, substituted a finding relating to such *intercession* in place of a specific finding that Holt had knowledge of the source of the loans.

Because of the Court's explanation in the second quoted paragraph, *supra,* of the charge, the jury could not only ignore a finding demonstrating Holt's specific knowledge, but it was also allowed to find that Holt had received a "thing of value", as descriptive of the loan, in place of "money" from the employer as charged in the indictment.

C. The Trial Court erroneously admitted hearsay evidence.

Over objection, the Court allowed in evidence a telephone conversation between Sternberg and Abrams which took place just prior to the October 18, 1957 loan. In

the conversation, Abrams was asked to arrange a loan for $30,000.00 to Holt, without interest, for which Sternberg would reimburse Abrams with a check in the same amount (H-a 52a-53a). At the same time Abrams was told not to inform Holt that the check came from Valley Commercial (H-a 77a).

Again over objection, Abrams testified that Adams Associates received a $30,000.00 check from Valley Commercial (H-a 53a-55a, G-1), and that after payment of the loan by Holt, Adams Associates returned their own check to Valley Commercial in the amount of $30,000.00 (H-a 55a, 56a, G-3).

To the same effect, testimony was allowed, over objection, that Sternberg and Abrams (or his associate) again conversed over the telephone for a few days prior to the loan of $54,600.00 made on April 15, 1959. On this occasion, Sternberg requested that a loan in the amount stated be made to Holt and that Adams Associates would be reimbursed for this loan by a check in the amount of $50,000.00 from Valley Commercial (H-a 57a-58a, 89a). Valley Commercial's check was received by Adams Associates (H-a 57a-59a, G-4), and following the repayment of this loan by Holt, Adams Associates sent its check for $50,000.00 back to Valley Commercial (H-a 67a-68a, G-12).

Over objection, Abrams testified that Sternberg called him on or about May 1, 1959 and requested he lend Holt $12,000.00 (H-a 62a-63a).

The admission of the evidence cited above was based upon the Court's interpretation of language in *U. S. v. Annunziato,* 293 F. 2d 373 (2 Cir. 1961), cert. den. 368 U. S. 919 (1961), involving a violation of 29 U. S. C. A. Section 186(b). The Court found that *Annunziato, supra,* was sufficient precedent for allowing such testimony. It is submitted, however, that the Trial Court ignored the fact

that the Court in *Annunziato, supra,* laid down a specific criterion in testing the admissibility of such evidence, at page 378:

> "The alternative ground for admissibility is as a statement by a co-conspirator. Appellant properly makes no point that the indictment did not charge a conspiracy; *it is enough if evidence, other than that whose admissibility is under challenge, disclosed one.* St. Clair v. United States, 1894, 154 U. S. 134, 149, 14 S. Ct. 1002, 38 L. Ed. 936; United States v. Pugliese, 2 Cir., 1945, 153 F. 2d 497, 500; People v. Luciano, 1938, 277 N. Y. 348, 14 N. E. 2d 433. The serious questions are whether Annunziato and Harry Terker had the sort of common purpose that makes certain declarations of one admissible against the other and, if so, whether Terker's declaration was of the sort that falls within that rule." (Emphasis added.)

Here, the evidence admitted over objection, is in fact the very evidence upon which the Government predicated its proof of an alleged conspiracy between Holt and Sternberg.

The acts and conversation of Sternberg, rather than being proof of the "existence of a design or plan to do a specific act" or as being statements demonstrating a design or plan "by the person's own statements" indicate no more than Sternberg's embarking on a private venture. *U. S.* v. *Annunziato, supra,* at page 377.

This hearsay evidence nowhere intimated, and in fact contradicted, the joint enterprise with the recipient. And it is clear there was not, as in *Annunziato, supra,* at page 380:

> "• • • ample evidence, other than Harry's statement to Richard, to show the common plan • • •."

Aside from the objectionable hearsay testimony, the record is bare of any other independent evidence of conspiracy.

In no way can this evidence be considered as a step in a venture in which both were parties. The Government failed, *with* this evidence, to prove any knowledge by Holt or any connection between Holt and Sternberg in the enterprise. Having been unable, *without* this evidence to demonstrate that Sternberg's calls were merely a step in a venture in which both were parties:

> "* * * it was as incompetent in a prosecution for conspiracy as anywhere else, although it appears impossible to disabuse prosecutors of the contrary belief." *U. S.* v. *Pugliese*, 153 F. 2d 497, 500 (2 Cir. 1945).

Once it was demonstrated that the other evidence in the case failed to establish that a criminal conspiracy existed, the hearsay conversations and the supporting documentary proof should have been stricken. The Court, *at least at that time*, no longer had the prerogative of allowing the jury to consider such evidence in concluding whether Holt, and Sternberg who was not on trial, were engaged in a joint criminal undertaking. See *U. S.* v. *Pugliese, supra.*

CONCLUSION

The Writ of Certiorari Should Be Granted

DAVID A. FIELD,
Attorney for Petitioners,
Harold Roth and Herbert S. Sternberg.

AND

WILLIAM ESBITT,
Attorney for Petitioner, Milton Holt.

APPENDIX TO PETITION

Opinion of United States Court of Appeals for the Second Circuit (Roth and Steinberg)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 136—September Term, 1963.

(Argued December 10, 1963 Decided June 5, 1964.)

Docket No. 28375

—o—

UNITED STATES OF AMERICA,

Appellee,

—v.—

HAROLD ROTH and HERBERT S. STERNBERG,

Defendants-Appellants.

—o—

Before:

MOORE,* SMITH and HAYS,

Circuit Judges.

—o—

Harold Roth and Herbert S. Sternberg appeal from judgment of conviction for violating 29 U. S. C. §186(a) and (d), after a jury verdict in the United States Dis-

* This appeal was argued before a panel composed of Judges Clark, Smith and Hays. Judge Clark died before any opinion had been prepared, and thereafter Judge Moore was substituted.

trict Court for the Southern District of New York, Harold R. Tyler, Jr., *Judge*.

Affirmed.

———o———

ARTHUR N. FIELD, New York, N. Y., *for appellant Harold Roth;* SIDNEY A. FLOREA, New York, N. Y., *for appellant Herbert S. Sternberg* (Irving Brown, of counsel).

THOMAS DAY EDWARDS, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, Andrew T. McEvoy, Jr., Robert J. Geniesse, Assistant United States Attorneys, of counsel), *for the United States of America.*

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MOORE, *Circuit Judge*:

These are appeals by defendants Roth and Sternberg from convictions in the Southern District of New York, for violations of section 302 of the Labor Management Relations Act of 1947, 29 U. S. C. A. §186(a), which prohibits an employer from paying or delivering "any money or other thing of value" to a representative of his employees. Roth was sentenced to six months in jail and fined $10,000; Sternberg was sentenced to two months in jail and fined $4,000. At a separate trial, Milton Holt, the recipient of the "thing of value," was found guilty by a jury of violating §186(b), which prohibits the receipt of anything of value from an employer by an employee representative. Holt was sentenced to six months

and fined $10,000. Execution was suspended on all three sentences.

There is no real dispute about the facts. In 1957 Roth was president of National Vending Corp. and Continental Vending Machine Corp. and Sternberg was a high ranking employee of those corporations (Sternberg signed the collective bargaining agreement for the corporation). Holt was the secretary-treasurer of the local union representing the employees. Sternberg was also the vice president of Valley Commercial Corp., a private finance company in which Roth was the major stockholder. In October of 1957 Sternberg, with Roth's approval, called Abrams of Adams Associates, another private finance company, and asked Adams to do them a personal favor by loaning Holt $30,000 without collateral or interest. Valley Commercial sent Adams Associates the funds with which to make the loan. Adams Associates thereupon made the loan and took Holt's note, endorsed by his wife. Eight months later, Holt repaid the loan.

In April of 1959 Sternberg again requested Adams Associates to make a short term loan ($54,600—two days) to Holt without interest or collateral. This pattern was repeated in May of 1959 ($12,000—18 days). All the loans were repaid, and all were backstopped by a Valley Commercial check except for the May 1959 loan. These three loans constitute, respectively, the subject matter of counts 1, 3 and 5 on which Roth and Sternberg were convicted.

At the time of these transactions, the statute involved, 29 U. S. C. A. §186, 61 Stat. 157, read:

> *Restrictions on payments to employee representatives; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds.*

(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

On September 14, 1959, this section was amended, 29 U. S. C. A. §186, 73 Stat. 537, to read:

Restrictions on payments and loans to employee representatives, labor organiaztions, officers and employees of labor organizatibns, and to employees; exceptions; penalties, jurisdiction; effective date; exception of certain trust funds.

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce . . .

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

Appellants argue that the statute prior to the 1959 amendment did not proscribe a loan. They say that their conclusion is buttressed by Congressional recognition in 1959 that loans were not included in section 186; hence, the addition of the word "lend" in the amendment. Congressional history is relied upon by appellants and Government alike in support of their respective contentions. Quite apart from the amendment, appellants contend that a statute creating a crime must give fair warning of the precise acts thereby made criminal. Thus, they argue, section 186 did not do so because the words "pay or deliver any money or other thing of value" do not reasonably include the making of a loan. The first question, therefore, is: was each of these interest-free loans without collateral a "thing of value"? Little purpose will be served by placing these words on the dissecting table. Nor will abstract discussion as to: is a loan a thing?, be helpful. Value is usually set by the desire to have the "thing" and depends upon the individual and the circumstances. We hold that a loan may reasonably be included within the wording of the statute and that the Congress so intended. Moreover, an even narrower construction was adopted by the court in its charge to the jury.

The court charged in part on the subject of "this element of thing of value as required under the statute and as meant under the statute":

> To put this another way, the government maintains that all the circumstances, all the evidence, prove beyond a reasonable doubt that the defendants intended to confer a benefit or thing of value upon Milton Holt in the form of these not insubstantial sums of money to be used by him free of interest and without collateral, whereas, defendants urge

> that there was no particular one-sided benefit or thing of value under the circumstances and that these were legitimate, normal loans paid or caused to be paid by them to Holt in this capacity as principals of a finance company and that they knew, as such principals, that Holt was a good credit risk.
>
> In determining whether or not there was a thing of monetary benefit or a thing of value conferred upon Holt, you can and you must consider all the surrounding circumstances as indicated by the evidence.

The court then made specific reference to such factors as the terms of the loan, interest, duration, collateral or absence thereof, Holt's purpose in obtaining the loan, the use to which he put the money and all other circumstances perceived from the evidence as pertinent. By their verdict of guilty, the jury found that the loans were things of value. This finding can be disregarded only if we hold as a matter of law that loans were not within the contemplation of section 186.

The purpose of the statute was "to prevent employers from tampering with the loyalty of union officials, and disloyal union officials for levying tribute upon employers." (*United States* v. *Ryan,* 225 F. 2d 417, 426, 2 Cir. 1955.) Congress wished to outlaw tampering with the loyalty of union officials by forbidding the delivery to any such official of that which might "turn the edge of his allegiance" (225 F. 2d 417, 426). Recognizing that favors may be conferred in many ways under many circumstances, Congress gave the broadest possible scope to the statute by adding to the word "money" the words "or other thing of value." See *United States* v. *Ryan,* 350

U. S. 299, 300 (1956). Whether the "thing" comes within the intendment of the statute is not always easy of resolution. The instructions here were, if anything, too favorable to defendants, and the issue was properly resolved by the jury. The court charged that the jury must find more than a loan in order to find guilt, that it must find that a substantial monetary benefit or thing of value must be conferred to constitute a violation on any count of this indictment.

The 1959 amendment made a significant change in that it sought to prevent anyone acting on behalf of an employer from doing that which the employer itself was forbidden to do. In addition, the word "lend" was inserted so that the section would read "pay, lend, or deliver." As might be expected, the age-old arguments are advanced as to the effect of this amendment. The Government argues that a loan was definitely embraced within the former section and that "lend" merely made explicit that which was already forbidden. Appellants, on the other hand, assert with substantial support from legislative history and decisional authority that "lend" had to be added to remedy a deficiency or loophole in the former section. Furthermore, they say, even assuming that this were done only for purposes of clarification, this very need conclusively establishes that the previous section did not give to appellants that clear and unequivocal warning of the criminality of the acts therein proscribed.

In *United States* v. *Carter*, 311 F. 2d 934, 7 Cir., (sic) 1963, the court, dealing with section 186 of the 1947 Act, posed two questions: (1) "Would a bona fide loan violate the statute?" and (2) "Was the alleged loan, in true fact, an outright payment?" In its actual decision, the court found that the transaction was not a loan but an outright

payment; hence, it affirmed the conviction. Those so minded can well argue that the first question became academic because there was no bona fide loan; therefor, any comments by the court could only be dicta. Technically, this may be true but comments of a court are never to be lightly disregarded. To call them dicta is frequently a polite subterfuge for expressing strong disagreement. The court in *Carter* said that it did not find in section 186 "a Congressional intent to make a bona fide loan between the parties described in the statute a crime." As to the effect of the 1959 amendment it reasoned that "such amendment was Congressional recognition that loans had not theretofore been covered." (311 F. 2d at 940.) The qualification in the question that the loan be "bona fide" may justify a conclusion that a loan not "bona fide" would be in violation. If this be so, *Carter* is no deterrent to the adoption of a principle that the question whether a loan conferred on a recipient is a substantial monetary benefit or thing of value should be resolved as a factual matter by court or jury. If *Carter* holds that any loan is exempt from the penalties of the statute, then disagreement is in order.

The coverage of the 1947 statute must be ascertained from its own terms precisely as if no amendment were ever to be drafted. Only if a "thing of value" could not include a loan delivered under such circumstances that it had "value" would a court be warranted in ruling as a matter of law that no violation of the statute had occurred. But it may be argued that a five-dollar Christmas tie is a "thing of value" and a Christmas present hopefully is to create good will in the recipient towards the donor. Countless hypothetical cases can be put, each on its facts approaching that evanescent borderline between the proper and the improper. No calculating ma-

chine has yet been invented to make these determinations with certainty. In the meantime the courts must rely upon the less mechanical judgment and common sense which under the present system is, and of necessity must be, lodged in judges and juries. The trial court exercised its judgment correctly in submitting the question to the jury; the jury in turn answered the question. Its verdict must be accepted.

The claimed variance, namely, between the indictment which read "a thing of value, to wit, money" and the proof of loans of the identical amounts does not create reversible error. The defendants knew and had fair notice of what they were charged with. See *United States* v. *Burgos*, 269 F. 2d 763, 767, 2 Cir., 1959, *cert. denied*, 362 U. S. 942 (1960).

Affirmed.

HAYS, *Circuit Judge* (dissenting):

The fact that the majority finds it necessary to argue the issue *in extenso* demonstrates, in itself, that Section 186 as it formerly read failed to prohibit loans with that clarity which is required of criminal statutes.

Opinion by United States Court of Appeals for the Second Circuit (Holt)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 136—September Term, 1963.

(Argued December 10, 1963 Decided June 5, 1964.)

Docket No. 28375

UNITED STATES OF AMERICA,

Appellee.

v.

MILTON HOLT,

Defendant-Appellant.

Before:

MOORE,* SMITH and HAYS,

Circuit Judges.

Milton Holt appeals from a judgment of conviction for violating 29 U. S. C. §186(b), after a jury verdict in the United States District Court for the Southern District of New York, Harold R. Tyler, Jr., *Judge*.

Affirmed.

* This appeal was argued before a panel composed of Judges Clark, Smith and Hays. Judge Clark died before any opinion had been prepared, and thereafter Judge Moore was substituted.

WILLIAM ESBITT, New York, N. Y. (Marvin B. Segal, of counsel), *for Appellant.*

THOMAS DAY EDWARDS, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, Michael S. Fawer, Andrew T. McEvoy, Jr., Assistant United States Attorneys, of counsel), *for the United States of America.*

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MOORE, *Circuit Judge*:

Appellant, Milton Holt, appeals from a judgment of conviction upon a jury verdict finding him guilty of having received "money or other thing of value" in violation of 29 U. S. C. A. §186(b) which proscribes such receipt by a representative of the employer's employees from an employer. Holt was Secretary-Treasurer of Local 805, Confectionery and Tobacco Drivers and Warehousemen, International Brotherhood of Teamsters and as such was a representative of employees of National Vending Corporation, Continental Vending Machine Corporation, and Continental Industries, Inc. The indictment in its three counts against Holt (counts 2, 4 and 6) charged him with receiving "a thing of value, to wit, money" in the respective amounts of $30,000, $50,000 and $12,000. The delivery of these amounts by the defendants Sternberg and Roth is dealt with in the opinion in a companion appeal, *United States* v. *Sternberg*, —— F. 2d —— (2d Cir. 1964).

Appellant assigns many points of error: (1) insufficiency of proof to sustain a conviction in that the Government failed to prove that Holt knew that the employers had transferred funds to Adams Associates which

actually made the loan; (2) refusal of the trial court to charge that such knowledge was a necessary element of the crime; (3) the admission of conversation between Sternberg and Abrams and of evidence of the transfer of funds between Valley Commercial and Adams Associates; (4) an alleged variance between the receipt of a loan as a "thing of value" and the charge of the receipt of money; (5) failure of the trial judge to disqualify himself on the jury trial after he had disqualified himself from trying the case without a jury; (6) denial of Holt's motion for a non-jury trial as a matter of right; and (7) improper selection of the grand jury. In addition, Holt relies upon the arguments made in *United States* v. *Sternberg, supra*, that section 186, 29 U. S. C. A. does not proscribe loans.

1. There was adequate proof from which at least the inference could be made that Holt knew the loans were coming from the employer.

2. The court properly instructed the jury that Holt's knowledge was an essential element in charging "did Mr. Holt actually know when receiving this thing of value both that it was a thing of value and that it was being conferred on behalf of an employing company or companies employing workers represented by him, Milton Holt?" The means chosen for handling the loans (referred to by appellant as "intercession") were admissible to lay the foundation from which the jury could draw its inference of knowledge that the loans came from the employer.

3. Frank Abrams of Adams Associates testified that Holt announced himself "as Mr. Holt about whom Sternberg of Valley Commercial spoke" and "that he came up

for a loan." Abrams told Holt that the loan was being made as a favor to, and without interest at the request of, his client Valley Commercial (Sternberg). This background sufficiently established as admissible the conversation wherein Sternberg asked Abrams to arrange a loan to Holt without interest for which Sternberg would reimburse Abrams.

4. The alleged variance between the receipt of money in the amounts of $30,000, $50,000 and $10,000, charged in the indictment, and the proof of the receipt of these amounts as loans was not prejudicial or fatal. Holt fully understood the charges which he had to meet.

5. No legal grounds for disqualification are alleged. 28 U. S. C. A. §144, §455. See *United States ex rel. Rogers* v. *Richmond*, 178 F. Supp. 44 (D. Conn. 1958). The judge had presided at the Sternberg-Roth trial. Holt had obtained a severance. The fact that a judge grants such a privilege to a defendant does not result in his disqualification to preside over the subsequent trial of the severed defendant.

6. Rule 23(a) Fed. R. Crim. Proc. provides that "Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government." Neither court approval nor government consent was obtained. The Advisory Committee noted, "The provision for a waiver of a jury trial by the defendant embodies existing practice, the constitutionality of which has been upheld." The Supreme Court in *Patton* v. *United States*, 281 U. S. 276, 312-13 (1930) reviewed at some length cases dealing with jury waiver in criminal trials. Its conclusion would seem just as sound today as in 1930:

> Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses. In such cases the value and appropriateness of jury trial have been established by long experience, and are not now to be denied. Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our tradition, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity.

In *Singer* v. *United States*, 326 F. 2d 132 (9 Cir., 1964),* the defendant claimed that he had a constitutional right to waive trial by jury and that to condition the right upon consent of the government is a denial of due process as provided by the Fifth Amendment.

It is difficult to subscribe to the contention that trial by jury so zealously safeguarded by the Constitution, can be

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* On April 20, 1964, the Supreme Court granted *certiorari* with respect to the following questions (32 U. S. L. W. 3365—4/21/64):

"1. Does the defendant have a constitutional right to waive a jury trial?

"2. Does the FR Cr P 23(a)'s conditioning of defendant's waiver of jury trial upon consent of the Government violate due process?"

considered a denial of due process or to understand how the requirements of a rule enabling this right to be waived reach so-called constitutional levels. It may be noted that the 1964 proposed amendments of the Criminal Rules formulated by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States do not change Rule 23(a) or suggest that the requirements of court approval and government consent be eliminated.

The *Patton* case was deemed to control the merits of the waiver without advice of counsel question in *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 275 (1942) wherein Mr. Justice Frankfurter for the Court upheld the waiver if "in the exercise of a free and intelligent choice, and with the considered approval of the court, * * *." The dissent of Mr. Justice Douglas, in which Justice Black and Murphy joined, stressed even more the exercise by the trial judge of "that 'sound and advised discretion' which the *Patton* case required even before a waiver of one juror was accepted" (317 U. S. at 284).

In *Mason* v. *United States*, 250 F. 2d 704, 705-6 (10 Cir., 1957) the court said:

> We, however, feel that the philosophy of the law is well established that the trial court is vested with a sound discretion in determining whether a jury trial should or should not be had, notwithstanding the accused's request that he be tried to the court. Such is the sense of Rule 23(a) of the Federal Rules of Criminal Procedure, 18 U. S. C. A., which provides that "Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government." Under this rule, the right to waive a jury and be tried to the court is not an absolute one; it requires the approval of the court and the consent of the government. Such

> we think is also the philosophy of the law as declared by the Supreme Court in *Patton* v. *United States*, 281 U. S. ——."

See also *Dixon* v. *United States*, 292 F. 2d 768, 769 (D. C. Cir., 1961); *C. I. T. Corporation* v. *United States*, 150 F. 2d 85, 91 (9 Cir., 1945); *Taylor* v. *United States*, 142 F. 2d 808, 816 (9 Cir., 1944); *Rees* v. *United States*, 95 F. 2d 784, 790-1 (4 Cir. 1938);* *United States* v. *Dubrin*, 93 F. 2d 499, 505 (2 Cir.), *cert. denied*, 303 U. S. 646 (1937).

There is no showing here that the trial judge did not exercise that "sound and advised" discretion referred to by the Supreme Court in both *Patton* and *McCann*. Denial of a non-jury trial under all the circumstances here presented was proper and did not deprive Holt of due process.

7. The selection of the grand jury point is without merit. See *United States* v. *Agueci*, 310 F. 2d 817, 833-34 (2 Cir., 1962), *cert. denied*, 372 U. S. 959 (1963).

Affirmed.

HAYS, *Circuit Judge*:

I dissent. See *United States* v. *Roth and Sternberg*, —— F. 2d —— (2d Cir. 1964).

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* "It cannot be conceived how a trial by a jury, presided over by a judge, could possibly be prejudicial to an accused. It is not only the province but the duty of the judge to pass upon the verdict of the jury and the sufficiency of the evidence to support the verdict. Under these fundamental and elementary principles, invariably governing the administration of criminal law in our courts, the accused, when tried by a jury, has every advantage he could possibly have in a trial before a judge alone. In effect he has a trial by the judge in addition to the trial by the jury.

"The judge properly exercised his authority in refusing to sanction the waiver of a jury trial and the rights of the defendants were in no way prejudiced by the judge's action."

Judgment of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of June one thousand nine hundred and sixty-four.

Present:

HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
HON. PAUL R. HAYES,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HAROLD ROTH, HERBERT S. STERNBERG, MILTON HOLT,
Defendants-Appellants,

NATIONAL VENDING CORPORATION, ET AL.,
Defendants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk